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No.

Office - Supreme Court, U.S.
FILED
JUN 28 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARRIOTT IN-FLITE SERVICES,
A Division of Marriott Corporation,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board's broad remedial power is subject to any fixed constraints when its decisions violate the "fundamental policies" of the Act.[1]

2. Whether bargaining freedom under Section 8(d) of the Act[2] means that both contracting parties need not make any specific concessions as a result of government compulsion and that they are free from having specific contract provisions imposed upon them against their will under the pretense of bad faith bargaining.

3. Whether, under the circumstances, the National Labor Relations Board and the Court of Appeals erred by not finding that a genuine impasse in negotiations existed on May 17, 1979 and August 27, 1979, respectively.

4. Whether the Petitioner may advise its employees of their "Section 7 Rights,"[3] under Section 8(c) of the Act,[4] to decertify their bargaining agent by providing them with a question and answer booklet *after* the Petitioner has bargained with the certified union (Intervenor) in excess of one (1) year and has offered to sign a collective bargaining agreement.

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[1]National Labor Relations Act, as amended (29 U.S.C. § 151, *et seq.*).

[2]29 U.S.C. § 158(d).

[3]29 U.S.C. § 157.

[4]29 U.S.C. § 158(c).

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

CONSTITUTIONAL AND STATUTORY PROVISIONS x

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. The Decisions Of the National Labor Relations Board That Are Inconsistent With A Statutory Mandate Or That Frustrate The Congressional Policy Underlying A Statute Warrant Being Set Aside 6

II. The Decisions Of the United States Circuit Courts Are In Conflict With Respect To The Authority Of The N.L.R.B. Or A Court To Impose Or Require The Making Of A Concession In Hard Bargaining 8

III. An Important Question Of Labor Law Exists As To Whether An Impasse Is Definable And Did Exist 15

IV. Enforcement Of The N.L.R.B.'s Decision Would Violate Petitioner's First Amendment Rights And Its Rights Under Section 8(c) Of The Act 20

Page

CONCLUSION 22

CERTIFICATE OF SERVICE 23

APPENDIX A:

Order Of U.S. Court of Appeals For The Second Circuit Denying Petition For Rehearing *En Banc* 1a

APPENDIX B:

Order Of U.S. Court of Appeals For The Second Circuit Enforcing Orders of National Labor Relations Board 3a

APPENDIX C:

Decision and Order Of The National Labor Relations Board, NLRB Case 29-CA-8931 ..... 6a

APPENDIX D:

Decision and Order Of The National Labor Relations Board, NLRB Case 29-CA-7913 ..... 18a

APPENDIX E:

Decision and Order Of The National Labor Relations Board, NLRB Case 29-CA-7541 ..... 30a

APPENDIX F:

Notice To Employees, Decertification Election Document "Fed Up" 92a

APPENDIX G:

Union Bulletin To Employees, Re: Company's Final Offer And Meeting To Establish A Date For A Strike, 6/19/79 ..... 101a

APPENDIX H:

Union Bulletin To Employees Re: Information Concerning The Coming Strike 103a

Page

APPENDIX I:

National Labor Relations Act As Amended, 29 U.S.C. § 157 ..... 105a

APPENDIX J:

National Labor Relations Act As Amended, 29 U.S.C. § 158(c) and (d) 106a

TABLE OF AUTHORITIES

Cases: **Page**

AFTRA v. N.L.R.B.,
395 F.2d 622 (D.C. Cir. 1968) 16, 19

Alsey Refractories Co.,
215 N.L.R.B. No. 146 (1974) 18

Charles D. Bonanno Linen Service, Inc. v. N.L.R.B.,
454 U.S. 404 (1982) 16, 19

Cheney California Lumber Co. v. N.L.R.B.,
319 F.2d 375 (9th Cir. 1963) 17

Chevron Oil Co. v. N.L.R.B.,
442 F.2d 1067 (5th Cir. 1971) 13

Gulf State Manufacturers v. N.L.R.B.,
579 F.2d 1298 (5th Cir. 1978) *aff'd in part, remanded in part en banc* 598 F.2d 896 (5th Cir. 1979) 13

Hi-Way Billboards, Inc.,
206 N.L.R.B. 22 (1973), *enforcement denied*
500 F.2d 181 (5th Cir. 1974) 16

Ithaca College v. N.L.R.B.,
623 F.2d 224 (2d Cir. 1980) *cert. denied* 449 U.S.
975 (1980) 8

Marriott In-Flite Services,
258 N.L.R.B. No. 99 (1980) 2

Marriott In-Flite Services,
259 N.L.R.B. No. 17 (1981) 2

Marriott In-Flite Services,
263 N.L.R.B. No. 137 (1982) 2

M.R.&R. Trucking v. N.L.R.B.,
434 F.2d 689 (5th Cir. 1970) 14

Page

N.L.R.B. v. American National Insurance Co.,
343 U.S. 395 (1952) 3, 10, 18

N.L.R.B. v. Brown,
380 U.S. 278 (1965) 6

N.L.R.B. v. Cambria Clay Products Co.,
215 F.2d 48 (6th Cir. 1954) *rehearing denied* 229 F.2d
433 (6th Cir. 1955) 18

N.L.R.B. v. Crompton-Highland Mills,
337 U.S. 217 (1949) *rehearing denied* 337 U.S. 950 (1949) 19

N.L.R.B. v. Gissel Packing Co.,
395 U.S. 575 (1969) *rehearing denied* 396 U.S. 869 (1969) 20

N.L.R.B. v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937) 3, 10

N.L.R.B. v. Reed & Prince Mfg. Co.,
205 F.2d 131 (1st Cir. 1953) *cert. denied*
346 U.S. 887 12

N.L.R.B. v. Tex-Tan, Inc.,
318 F.2d 472 (5th Cir. 1963) 15, 19

N.L.R.B. v. Tomco Communications, Inc.,
567 F.2d 871 (9th Cir. 1978) 13

N.L.R.B. v. Webb Furniture Co.,
366 F.2d 314 (4th Cir. 1966) 18

Pease Company v. N.L.R.B.,
666 F.2d 1044 (6th Cir. 1981) *cert. denied* 456 U.S.
974 (1982) 14

Pittsburgh-Des Moines Corp. v. N.L.R.B.,
663 F.2d 956 (9th Cir. 1981) 15

H.K. Porter Co. v. N.L.R.B.,
397 U.S. 99 (1970) 3, 5, 6, 10, 11, 12

Page

Stokeley-Van Camp, Inc.,
186 N.L.R.B. No. 64 (1970) 21

Taft Broadcasting Co.,
163 N.L.R.B. 475 (1967) 19

Teamsters Local 357 v. N.L.R.B.,
365 U.S. 667 (1961) 3, 10

United States Cold Storage Corp.,
96 N.L.R.B. 1108 (1951) *enforced* 203 F.2d 924
(5th Cir. 1953), *cert. denied* 346 U.S. 818 (1953) 19

Statutes:

U.S. Constitution, First Amendment 2, 20

28 U.S.C. § 1254(1) 2

29 U.S.C. § 151, *et seq.* ..... (i)

29 U.S.C. § 157 ..... (i), 2, 20, 21

29 U.S.C. § 158(a)(1) 8, 15, 20, 21

29 U.S.C. § 158(a)(3) 12

29 U.S.C. § 158(a)(5) 8, 15

29 U.S.C. § 158(c) ..... (i), 2, 18, 20, 21

29 U.S.C. § 158(d) ..... (i), 2, 3, 6, 8, 10, 15

29 U.S.C. §159 20

29 U.S.C. § 203(b) 18

Page

Miscellaneous:

BNA Retail Service Labor Report, No. 1674, pp. A-1 - A-4 16

Exec. Order No. 9017, 3 C.F.R. 1075 (1942) 9

Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 N.W.U.L. 735 (1969) 9

H.R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947) 10

S. Rep. No. 573, 74th Cong., 1st Sess. 12 (1935) 9

77 Stat. 132 (1963) 9

81 Stat. 122 (1967) 9

CONSTITUTIONAL PROVISIONS

United States Constitution, First Amendment [in pertinent part]:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

STATUTORY PROVISIONS

National Labor Relations Act, as amended:

29 U.S.C. § 157 (See Appendix I).
29 U.S.C. § 158(c) and (d) (See Appendix J).
29 U.S.C. § 159(c)(1)(A)(ii).

IN THE

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OCTOBER TERM, 1982

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

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INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO,
Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Marriott In-Flite Services, a Division of Marriott Corporation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B) is unreported. The decision that is the real subject of this Court's review is reported at 258 N.L.R.B. No. 99 (Appendix E). The cases reported at 259 N.L.R.B. No. 17 (Appendix D) and 263 N.L.R.B. No. 137 (Appendix C) are dependent upon this Court's ruling in the lead case.

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1983 (Appendix B). A timely petition for rehearing and suggestion for a rehearing *en banc* was denied on May 2, 1983 (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

STATUTES INVOLVED

The statutes primarily involved are 29 U.S.C. §§ 157, (Appendix I), 158(c) and (d) (Appendix J).

STATEMENT OF THE CASE

This case presents interesting questions with respect to the Respondent's continued policy of non-acquiescence to decisions of the U.S. Supreme Court and U.S. Courts of Appeals holding that the Respondent is without the power to compel a company or a union to agree to any substan-

tive contractual provision of a collective bargaining agreement. While the Respondent may require a company and its employees' representative to negotiate, it cannot choose to ignore the courts' decisions as if they had no force or effect. Section 8(d) of the Act (29 U.S.C. § 158(d)) expressly provides that the existence of such bargaining obligation "does not compel either party to agree to a proposal or require the making of a concession." Thus, the Respondent's speculation that Petitioner bargained in bad faith due to the fact that it refused to grant Intervenor a "union security clause" and "dues checkoff clause" is without merit and the decision below is totally contrary to this Court's decisions in *H.K. Porter Co. v. N.L.R.B.*, 397 U.S. 99 (1970); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *N.L.R.B. v. American National Insurance Co.*, 343 U.S. 395 (1952); and *Teamsters Local 357 v. N.L.R.B.*, 365 U.S. 667 (1961).

On September 27, 1978, a Certification of Representative was issued to the Intervenor, and the parties agreed to commence negotiations on October 20, 1978, and continued to negotiate through October 9, 1979.

Between October 20, 1978 and May 17, 1979, the parties had participated in thirty-seven (37) bargaining sessions and had fully discussed their respective proposals with each other and had reached agreement on a majority of the contractual clauses. During this period Petitioner, with the Intervenor's agreement, granted an eight percent (8%) wage increase at the end of March, 1979. Likewise, Petitioner had fully discussed and addressed all of the Intervenor's proposals. On May 17, 1979, the Intervenor acknowledged that only three (3) items had not been resolved: (1) wages; (2) union security clause; and (3) dues checkoff. The $.30 meal charge was eliminated by the Petitioner in the bargaining session on May 17, 1979 at the

cost of $50,000 a year more in fringe benefit expenditures. In addition to the foregoing, the Petitioner had proposed a complete agreement which included the following articles: Sole Agreement, Purpose of Agreement, Recognition, Classification, Management Rights, Hours of Service, Overtime and Holidays, Seniority, Leave of Absences, Vacation with Pay, Funeral Leave, Discharge and the Grievance Procedure, No Strike-No Lockout, General and Miscellaneous Provisions, Benefits, Union Bulletin Board, Saving Clause, Supervisors as Defined by the Act, Jury Duty, Insurance, Pension, and Duration of Agreement. Also, a general benefits savings clause precluded employees from losing any benefits not mentioned in the agreement providing they were current recipients of them.

On April 26, 1979, some twenty-one (21) days before May 17, 1979, the Intervenor was of the opinion that it was within a "maximum of four hours" of completing a collective bargaining agreement. It further recognized that certain items were preventing a final agreement and decided to call in the Federal Mediation and Conciliation Service for the April 30 meeting.

After presiding over four (4) separate bargaining sessions, the mediator concluded that there was no further movement on the part of either party and did not schedule future meetings.

The parties returned to the bargaining table, after a fifty-three (53) day hiatus, on July 10 at the invitation of the mediator. Thereafter, a second mediator entered the negotiations on July 26, 1979, and later advised the parties on August 27, that there was nothing more that he could do at this time. Between August 28 and October 1, 1979, the second hiatus, an officer of the Intervenor advised the Petitioner that the *stalemate* between the parties could be

broken if the Petitioner agreed to give the Intervenor a union security clause and a dues checkoff clause.

On October 2, 1979, the mediator again met with the parties and the Petitioner once again agreed to sign an agreement without a union security clause and a dues checkoff clause.

The parties' last bargaining session was held on October 9; this was the forty-fifth (45) bargaining session, and once again, the parties held fast to their former positions.

Having offered to sign agreements on May 17, October 2, and October 9, 1979, the Petitioner communicated to its employees their right to decertify under the Act on October 10, 11 and 12, 1979.

Within two (2) days after these meetings began, a bargaining unit employee obtained the signatures of a majority of the employees and filed a decertification petition on October 12, 1979. Thereafter, Petitioner advised the Intervenor it would not negotiate pending the outcome of the question concerning representation. The decertification petition was dismissed as a result of the ULP charge filed on October 18, 1979.

The issue of whether an employer, *for any reason,* may refuse to consider a union security clause and/or a dues checkoff clause in negotiations has been decided by this Court. In *H.K. Porter Co. v. N.L.R.B., supra,* the employer "admitted it had no business reason" for refusing to grant a dues checkoff clause. The employer asserted that since the Act required that any collective bargaining obligation be established by mutual consent, the Board could not force its consent or impose the clause without such consent. This Court held that even though the Board has the power "to require employers and employees to

negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement."

Finally, this action is totally contrary to the decisions of Courts of Appeals in the First, Fifth, Sixth, and Ninth Circuits.

REASONS FOR GRANTING THE WRIT

I. The Decisions Of The National Labor Relations Board That Are Inconsistent With A Statutory Mandate Or That Frustrate The Congressional Policy Underlying A Statute Warrant Being Set Aside.

Because the Respondent has a proclivity for finding bad faith even where the employer's conduct is reasonable, and due to the N.L.R.B.'s policy of non-acquiescence to court rulings on "hard bargaining", this case requires a careful consideration of the appropriate standards of judicial review. The measure of deference this Court pays to the Respondent's interpretation of what constitutes good faith bargaining and what is an impasse will have a great deal to do with whether the fundamental premise of the Act will survive – "private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. N.L.R.B.*, 397 U.S. at 108. As we have seen, the Respondent's decision and interpretation of Section 8(d) is simply indefensible when measured by any reasoned application of the statute, considering Congressional intent and the *H.K. Porter* case, and warrants being set aside.

This approach is consistent with this Court's observation in *N.L.R.B. v. Brown*, 380 U.S. 278 (1965):

> Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive . . . . Courts should be "slow to overturn an administrative decision," . . . but they are not left "to 'sheer acceptance' of the Board's conclusions," . . . . Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress." . . . Courts must, of course, set aside Board decisions which rest on an "erroneous legal foundation." (Citations omitted.)

380 U.S. 291-292.

Accordingly, the appropriate standard of review in this case is simply a determination of whether the Respondent's decision is right or wrong on its legal merits. From a practical standpoint, the Respondent's decision requires

Petitioner to concede to the Intervenor's demands of "union security and dues checkoff" or be found guilty of having violated Sections 8(a)(1) and (5) of the Act. The facts and law in the record argue rather plainly against the Respondent's rationale.

II. The Decisions Of The United States Circuit Courts Are In Conflict With Respect To The Authority Of the N.L.R.B. Or A Court To Impose Or Require The Making Of A Concession In Hard Bargaining.

The National Labor Relations Act[5] defines the duty to bargain as the duty "to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or any question arising thereunder . . . ." It further adds that "such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ."

Clearly then, a party taking a hard stand is not unwilling to bargain in good faith. But the distinction between "bad faith bargaining" – a de facto refusal to bargain – *and* "tough or hard bargaining" is the subject of much disagreement between the courts and the Respondent. The Respondent in this case chose to ignore the Act's tenet that you cannot compel either party to agree to a proposal or to make a concession. Furthermore, it chose to ignore the decisions of Courts of Appeals and the U.S. Supreme Court which clearly affirm the Act's tenet. "This is intolerable if the rule of law is to prevail."[6]

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[5] 29 U.S.C. § 158(d).

[6] *Ithaca College v. N.L.R.B.*, 623 F.2d 224, 228 (2d Cir. 1980), *cert. denied* 449 U.S. 975 (1980).

Congress has consistently declined to interfere with free collective bargaining[7] and has preferred that device, or voluntary arbitration, to the imposition of compulsory terms as a means of avoiding or terminating labor disputes. In its report accompanying the 1935 Act, the Senate Committee on Education and Labor stated:

> The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of the collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

S. Rep. No. 573, 74th Cong., 1st Sess., 12 (1935).

The U.S. Supreme Court immediately adhered to the basic tenet by holding:

> The Act does not compel any agreement whatever . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements, which the Act in itself does not attempt to compel.

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[7]Two exceptions to this general reluctance to interfere with free collective bargaining are the imposition of compulsory arbitration during wartime, Exec. Order No. 9017, 3 C.F.R. 1075 (1942), and, on occasion, in the railroad industry, 77 Stat. 132 (1963), 81 Stat. 122 (1967). Congress has consistently rejected compulsory arbitration even as a remedy for "national emergency" disputes, however. See Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 N.W.U.L. Rev. 735, 742-743 (1969).

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. at 45; *N.L.R.B. v. American National Insurance Co.*, 343 U.S. at 401-402; *Teamsters Local 357 v. N.L.R.B.*, 365 U.S. 667, 676-677 (1961).

In 1947, Congress expressed its will and the above theory by enacting Section 8(d) of the Act,[5] by stating:

> [T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith in setting itself up as the judge of what concessions an employer must make and what proposals they may or may not make . . . unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements.

H.R. Rep. No. 245, 80th Cong., 1st Sess., 19-20 (1947).

Substantive collective bargaining proposals are matters to be decided by the employer and the union and not by the Respondent. Furthermore, it is a well settled principle in labor law that the Respondent has neither the authority nor the power to determine, decide, or dictate the substantive terms or conditions of a collective bargaining agreement.

In *H.K. Porter Co. v. N.L.R.B., supra,* this Court held:

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. It would be anomalous indeed to hold that while Section 8(d) prohibits the Board

[5] 29 U.S.C. § 158(d).

> from relying on a refusal to agree as the sole evidence of bad faith bargaining, the Act permits the Board to compel agreement in that same dispute. The Board's remedial powers under Section 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based – private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract . . . .
>
> But the Act as presently drawn does not contemplate that the union will always be secure and able to achieve agreement even when their economic position is weak, nor that strikes and lockouts will never result from a bargaining to impasse. *It cannot be said that the Act forbids an employer or a union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining* . . . But it is the job of Congress, not the Board or the courts, to decide when and if it is necessary to allow governmental review of proposals for collective bargaining agreements and compulsory submission to one side's demands. The present Act does not envision such a process.
> (Emphasis added.)

It appears that the facts herein are basically similar to the facts in *H.K. Porter.* A reading of the Respondent's decision confirms that the Respondent has failed to heed the

admonitions of the *H.K. Porter* case and is seeking to either relitigate it and/or undermine Congress's will once again by setting itself up as the judge of what concessions an employer must make. Whether or not Petitioner's actions frustrated the reaching of an agreement or were deemed to be negative and unyielding because it did not submit what Respondent deemed to be a legitimate business reason for not granting the Intervenor's demands is immaterial under *H.K. Porter, supra.*

Under Section 8(a)(3) of the Act,[9] the proviso states:

> [N]othing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . .

Thus, Congress was again clear with its intent that the employer had a voluntary right to grant or not grant a union security clause to a bargaining agent.

The fact that the Respondent believes that the Petitioner's "contractual offers were such that no self-respecting union could be expected to accept"[10] them is not a valid analytical tool. If used as an analytical tool, it comes perilously close to determining what the employer should give by looking at what the bargaining agents want. If the Court would adopt the Respondent's beliefs, a finding of bad faith would require the Petitioner to yield to any demand despite the Intervenor's inability to enforce its

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[9]29 U.S.C. § 158(a)(3).

[10]*N.L.R.B. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir. 1953) *cert. denied*, 346 U.S. 887.

will through the classic economic weapons of labor relations. *N.L.R.B. v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978).

In reviewing the Petitioner's actions herein regarding good faith, the Appeals Court, on the central issue of bargaining intent, should have recognized that the events in question resolve into a case of simple hard bargaining between two parties who were possessed of disparate economic power: a relatively weak Intervenor based on the fact of lack of majority support to strike in support of its demands, and a relatively strong Petitioner who was prepared to suffer the economic consequences of a strike by refusing to accede to the Intervenor's demands. Thus, it was only natural for Petitioner to use its advantage by retaining as many rights as possible. Its desire to do so was not inconsistent with its statutory duty to bargain in good faith. *Chevron Oil Co. v. N.L.R.B.*, 442 F.2d 1067, 1073 (5th Cir. 1971).

Respondent's obsession with Petitioner having a closed mind with respect to two issues, "union security and dues checkoff," and concluding that it was for the purpose of frustrating the reaching of any agreement is not supported by legal findings. The stance of the Respondent in this regard smacked of partisanship in favor of the Intervenor in an effort to give the Intervenor what it wanted rather than what the parties could agree to. *Gulf State Manufacturers v. N.L.R.B.*, 579 F.2d 1298 (5th Cir. 1978), *aff'd in part, remanded in part en banc* 598 F.2d 896 (5th Cir. 1979).

Respondent's denigration of the Petitioner as being *intransigent* with respect to the two above issues ignored the right of Petitioner to take advantage of its superior bargaining position. Indeed, the mere fact that the In-

tervenor admitted that only two items precluded the parties from reaching an agreement on May 17, and/or October 2, and/or October 9, 1979 tends to rebut affirmatively the inference that the Petitioner was bargaining with no good faith intent to reach an agreement. In *M.R. & R. Trucking v. N.L.R.B.*, 434 F.2d 689, 695 (5th Cir. 1970), the Court stated:

> [T]he Board's treatment of the underlying evidence, largely undisputed, is deficient in two major respects. Recognition is not given to the hard bargaining and exertion of economic force by both sides and to the right of the company to use the stronger bargaining position in which it found itself . . . . The Board's failure to recognize the applicability of this principle is but part of a broader deficiency, which is its treatment of actions of the company as though existent in isolation, without regard to the context of negotiations in which they arose or the particular actions of the union to which they were responses.

The Respondent's decision in this case that the Petitioner failed to bargain in good faith suffers from the same deficiencies.

In *Pease Company v. N.L.R.B.*, 666 F.2d 1044 (6th Cir. 1981), *cert. denied* 456 U.S. 974 (1982), the Sixth Circuit ruled for the employer, finding no evidence of bad faith in the employer's proposals or tactics. It held the employer may insist on a proposal, however unacceptable to the union and *confirmed the principle that good faith bargaining does not require the employer to make proposals that are acceptable to the union, even if the employer's insistence produces a stalemate.* (Emphasis added). It found that this was simply a case of hard bargaining between two parties using their respective economic powers and stress-

ed that the proper standard to follow is not whether the employer's proposals were acceptable to the union but whether the employer desired to reach ultimate agreement. In the instant case, the Petitioner, on a number of occasions, offered to sign an agreement. Also see *Pittsburgh-Des Moines Corp. v. N.L.R.B.*, 663 F.2d 956 (9th Cir. 1981).

While the Respondent may disapprove of "hard bargaining" between two parties who use their respective economic powers or relative bargaining strengths to their best advantage, it is not empowered to find this conduct unlawful under Section 8(a)(1) and (5) and 8(d) of the Act.

III. An Important Question Of Labor Law Exists As To Whether An Impasse Is Definable And Did Exist.

While the terms impasse, deadlock, or stalemate are not terms with a precise meaning, they are definable.

An impasse is a "state of facts in which the parties, despite the best of faith, are simply deadlocked." *N.L.R.B. v. Tex-Tan, Inc.*, 318 F.2d 472 (5th Cir. 1963). The courts look to such matters as the number of meetings between the company and the union, the length of those meetings and the period of time that has transpired between the start of negotiations and their breaking off. Also properly considered are whether the refusal to modify bargaining positions occurred only at the last meeting or has embraced several meetings before the last, whether either party has expressed a willingness to modify its position or to bargain further, *and whether the parties have called in a mediator to assist negotiations.* (Emphasis added). When the latter occurs, it is generally understood to demonstrate an acknowledgment by the parties of "deadlock". Last year, N.L.R.B. Deputy Associate General

Counsel Norton J. Come asserted in oral argument[11] before the U.S. Supreme Court when questioned by Justice Rehnquist:

Q. What is the Board's definition of impasse?

A. In *Hi-Way Billboards, Inc.*[12] ruling, NLRB ex-explained that an impasse is not an unexpected, unforeseen or unusual event in negotiations. It is "only a temporary 'deadlock' or 'hiatus' in negotiations which in almost all cases is eventually broken through a change of mind or the application of economic force."

Justice Rehnquist observed:

Then it's the Board's view that an impasse is something that occurs fairly regularly.

Come agreed:

That is correct.

Also, at times, a single issue will loom so large in the negotiations that a "stalemate" on that issue alone may legitimately be found to cripple prospects for settlement on any others. In such cases, the Board will find an impasse. In *AFTRA v. N.L.R.B.*, 395 F.2d 622 (D.C. Cir. 1968), the Court enforced the Board's holding that, "A deadlock is still a deadlock whether produced by one or a number of significant and unresolved differences in positions."

Respondent chose to ignore the evidence that the issues over "union security and dues checkoff" between the par-

[11] *Charles D. Bonanno Linen Service, Inc. v. N.L.R.B.*, 454 U.S. 404 (1982); BNA Retail Service Labor Report, No. 1674, pp. A-1, A-3 - A-4.

[12] 206 N.L.R.B. 22 (1973) *enforcement den.*, 500 F.2d 181 (5th Cir. 1974).

ties loomed so large that a "stalemate" as to those issues may be fairly stated to have crippled the prospects of any agreement. This condition existed on May 17 through July 10, and again on August 27 through October 2, 1979. Mr. William Sherry, who was assigned to Intervenor's International Office in Washington, D.C., stated that a "stalemate existed" when he requested a meeting in September with Marriott officials in Washington, D.C. *Cheney California Lumber Co. v. N.L.R.B.*, 319 F.2d 375, 380 (9th Cir. 1963). From his statement, it would be hard to ignore the fact that the union's negotiators had to have informed him that negotiations were at an impasse, or a stalemate.

Another factor the Respondent failed to consider was the conduct of the mediators assigned to the negotiations.

In both instances, the respective mediators (called into negotiations by the Intervenor) were able to bring the parties together on a weekly basis. Commissioner Miller was able to arrange for regular meetings from April 30 through May 17; however, after that date, there were no meetings until July 10, 1979. Commissioner Rosow was also able to arrange for regular meetings from July 26 through August 27, 1979, and thereafter did not call the parties back until October 2, 1979.

Respondent, for reasons unknown, continued to ignore the evidence before it, in that when the parties returned to the bargaining table on July 10 at Commissioner Miller's request Intervenor's agent suggested looking at the agreement again to see whether or not there was a possibility of the parties getting together. As to the second impasse occurring on August 27, Intervenor's agent admitted that the parties had broken off negotiations.

Q. Do you recall negotiations breaking off after that date?

A. Yes, I think there was – we had gotten into a discussion about maybe somebody in Washington *could get us off the dime* on this thing . . . . (Emphasis added.)

What happened if anything? Surely it was not the fact as expressed by the Intervenor's agent that Commissioner Miller was unable to meet with the parties. Under Section 203(b) of the Act,[13] it was the duty of the Federal Mediation and Conciliation Service, acting through its mediators, to use its best efforts to bring the parties to an agreement, and it must be assumed that it performed its duties. Under the circumstances of this case and in the absence of evidence to the contrary, there arises a strong inference that both mediators arranged no further meetings, during their respective control periods of the negotiations because of the absence of any prospects of bringing the parties to an agreement. *N.L.R.B. v. Cambria Clay Products Co.*, 215 F.2d 48 (6th Cir. 1954), *rehearing denied* 229 F.2d 433 (6th Cir. 1955).

Based on the facts and circumstances herein, the Petitioner was warranted in assuming that further bargaining on May 17 and/or August 27, 1979 would have been futile. *Alsey Refractories Co.*, 215 N.L.R.B. No. 146 (1974). The law supports the fact that an employer and union need not engage in futile talk when a genuine impasse has been reached. *N.L.R.B. v. American National Insurance Co., supra; N.L.R.B. v. Webb Furniture Co.*, 366 F.2d 314, 315 (4th Cir. 1966).

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[13] 29 U.S.C. § 203(b).

Given the many factors commonly itemized by the courts in impasse cases and the fact that "union security and dues checkoff" were irreconcilable issues on May 17, August 27, October 2, and October 9, the N.L.R.B. and the Appeals Court should have found that an impasse was reached on May 17 through July 9, 1979, and August 27, through October 2, 1979, and again on October 9, respectively, and that Petitioner's action taken on May 31, 1979 was not in violation of the Act, since an employer may immediately put into effect any wage adjustment or other benefits offered to the union during collective bargaining after an impasse in bargaining has been reached. *N.L.R.B. v. Crompton Highland Mills,* 337 U.S. 217 (1949); *rehearing denied* 337 U.S. 950; *N.L.R.B. v. Tex-Tan, Inc., supra; Taft Broadcasting Co.,* 163 N.L.R.B. 475 (1967); *AFTRA v. N.L.R.B., supra.*

The fact Petitioner returned to the bargaining table on July 10 and later on October 2, 1979 does not negate the fact that an impasse existed during the respective periods since an impasse does not continue forever. *United States Cold Storage Corp.,* 96 N.L.R.B. 1108 (1951), *enforced* 203 F.2d 924 (5th Cir. 1953) *cert. denied* 346 U.S. 818 (1953); *Charles D. Bonanno Linen Service Inc. v. N.L.R.B, supra.*

Respondent's conclusion that when negotiations broke off on May 17, there were about 26 open items is not supported by the record because in fact only two items prevented Intervenor from signing an agreement, namely "union security and dues checkoff." (Appendices G and H). These same two items were in issue on October 2, and October 9, 1979. Intervenor further acknowledged in writing on May 22, 1979 to its members that no further negotiations were scheduled.

IV. Enforcement Of The N.L.R.B.'s Decision Would Violate Petitioner's First Amendment Rights And Its Rights Under Section 8(c) Of The Act.

Petitioner submits that 29 U.S.C. § 158(c) of the Act and the First Amendment to the Constitution[14] protects the right of free speech in that an employer, during negotiations, may "communicate" with its employees by expressing its views, argument, or opinion, providing the "communication" is expressed in such a fashion that it is not violative of 29 U.S.C. § 158(a)(1) of the Act. Thus, if there is no threat of force or reprisal or promise of benefit in the context of the employees' "Section 7 Rights", the expression or communication is not violative of 29 U.S.C. § 158(a)(1) of the Act. Therefore, each case of this type depends on its particular facts, and the statements which create a "Free Speech" issue in each case must be evaluated within the frame of reference in which they were made.

In the instant case, Petitioner refrained from providing any information to its employees about the decertification process[15] until after its October 9, 1979 meeting with Intervenor. During the certification year, it advised its employees that the Intervenor had a year to work out a collective bargaining agreement. The record is clear that the Petitioner could have provided this information to its employees after the September 27, expiration of the certification year but instead, it chose to attempt to reach a signed agreement with the Intervenor on October 2, 1979 and once again on October 9, 1979.

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[14]U.S. Constitution, Amendment I provides: "Congress shall make no law . . . abridging the freedom of speech . . . ." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617-618 (1969), *rehearing denied* 396 U.S. 869.

[15]29 U.S.C. § 159.

Thus, once an employer has negotiated with the newly certified union in excess of one year and has sought to sign a comprehensive collective bargaining agreement with the union during that period, the Appeals Court should have found that Petitioner could provide its employees with information under the Act relating to their "Section 7 Rights" and their rights to file a decertification petition.

The question and answer booklet (Appendix F) made available by Petitioner to its employees was nothing more than Petitioner dispensing factual information to its employees which clearly indicated that they had a choice as to whether or not to file a decertification petition. This type of factual information is permissible under Section 8(c) of the Act. The fact that the employees picked up the booklets, *outside the presence of management,* and acted upon the information by circulating a decertification petition on their own initiative is not a violation of the Act.

Once an employee says to any management representative that he or she does not want the union and asks what can be done, the employer, under the Act, and the U.S. Constitution, need not remain silent. The employer can inform the employee that a decertification petition may be filed and can impart information on how to do it providing the imparting of the information does not violate Sections 8(a)(1) and (c) of the Act. Petitioner's action, in imparting information to its employees on October 10, 11, and 12, 1979, was permissible under the Act. *Stokely-Van Camp, Inc.*, 186 N.L.R.B. No. 64 (1970).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

CARLTON J. TROSCLAIR*
MARRIOTT CORPORATION
10400 Fernwood Road
Bethesda, Maryland 20058
Telephone: 301/897-7559

*Counsel of Record for Petitioner
Marriott In-Flite Services

CERTIFICATE OF SERVICE

I, CARLTON J. TROSCLAIR, hereby certify that I have on June 29, 1983, by United States Mail, postage prepaid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

Samuel M. Kaynard
Regional Director, Twenty-Ninth Region
National Labor Relations Board
16 Court Street
Brooklyn, New York 11241

Elliott Moore
Deputy Associate General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Kevin P. Quill
Attorney for Intervenor
Chase Manhattan Bank Building
29-17 41st Avenue
Long Island City, New York 11101

CARLTON J. TROSCLAIR

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
No. 82-4165

At stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of May, one thousand nine hundred and eighty-three.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MARRIOTT IN-FLIGHT SERVICES, A DIVISION OF MARRIOTT CORPORATION,
Respondent.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Intervenes.

UNITED STATES
COURT OF APPEALS
FILED MAY 2 1983
SECOND CIRCUIT
A. Daniel Fusaro, Clerk

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent, Marriott In-Flite Services,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel

that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by: Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX B

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 82-4165

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourteenth day of March, one thousand nine hundred and eighty-three.

Present:
Hon. Walter R. Mansfield,
Hon. James L. Oakes,
Hon. Jon O. Newman,
Circuit Judges.

National Labor Relations Board
Petitioner,

v.

Marriott In-Flite Services, a division of Marriott Corporation,
Respondent,

and

International Association of Machinists and Aerospace Workers, AFL-CIO,
Intervenor.

ORDER

This case is before this court upon an application by the National Labor Relations Board (Board) for enforcement of its orders issued against Marriott In-Flite Services, Inc., a division of Marriott Corporation (Marriott), pursuant to Section 10(e) of the National Labor Relations Act. 29 U.S.C. § 160(e). After an eight-day hearing, Administrative Law Judge Robert A. Giannasi, in a detailed and careful decision, found that Marriott had bargained in bad faith with the union by its overall bargaining conduct, by unilaterally changing existing personnel policies, by originating and sponsoring an employee effort to decertify the union, and by withdrawing recognition of the union even though the union had been certified by the Board as the exclusive representative of its employees. The Board accepted Judge Giannasi's findings and, with minor and appropriate modifications, endorsed the relief ordered. Marriott's challenges to the Board's decision are based on the facts that led to the finding of bad faith below. The record contains substantial and, perhaps, overwhelming evidence to support the Board's findings. If it were not for the delay from September 17, 1980, the date of Judge Giannasi's decision, until September 14, 1982, the date of the Board's final cease-and-desist order, we would decry Marriott's appeal in the case as another instance where it has imposed dilatory impediments in the way of negotiations. But the blame for a full two years of delay in the labor negotiations to which Marriott's employees are entitled must rest at least in equal measure with the Board, whose delay in deciding this case has impaired the accomplishment of the law's aims as much as those who have chosen to stand directly in its way.

We hereby order enforcement of the Board's Decisions and Orders reported at 258 NLRB 755, 259 NLRB No. 17, and 263 NLRB No. 137.

Walter R. Mansfield
James L. Oakes
Jon O. Newman
Circuit Judges.

APPENDIX C

263 NLRB No. 137

FJZ
D–9203
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

MARRIOTT IN-FLIGHT SERVICES, A
DIVISION OF MARRIOTT
CORPORATION,

and Case 29-CA-8931

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO.

DECISION AND ORDER

Upon a charge filed by International Association of Machinists and Aerospace Workers, AFL–CIO, hereinafter referred to as the IAM, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint and notice of hearing, dated July 10, 1981, against Marriott In-Flite Services, a Division of Marriott Corporation, hereinafter referred to as Respondent. The complaint alleges that Respondent has engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing were fully served on the parties. Respond-

ent filed an answer to the complaint, denying that it committed any unfair labor practices and setting forth certain affirmative defenses.

Thereafter, the parties entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to the Board for findings of fact, conclusions of law and an order. The parties stipulated that the charge, the complaint, and the answer, as well as the transcripts and exhibits in *Marriott In-Flite Services, a Division of Marriott Corporation,* 258 NLRB No. 99 (1981)[1] (herein *Marriott I*), and *Marriott In-Flite Services, a Division of Marriott Corporation,* 259 NLRB No. 17 (1981) (herein *Marriott II*), constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties also waived a hearing before, and the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision.

On April 22, 1982, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, counsel for the General Counsel filed a brief in support of his position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, including the exhibits, the brief, and the entire record in this proceeding, and hereby makes the following:

---

[1] In that case the Board found, *inter alia*, that Respondent engaged in bad-faith bargaining, unlawfully implemented certain unilateral changes, and engaged in an unlawful withdrawal of recognition. The Board also found that Respondent did not have a reasonably based good-faith doubt as to Lodge 1894's continued majority status.

Findings of Fact

I. The Business of Respondent

Respondent has at all times material herein been a Delaware corporation, with its principal office and place of business in Washington, D.C., and with various other places of business in the States of Maryland, New York, Florida, California, and other States. Respondent is, and has been at all times material herein, engaged in the airline catering, hotel, and restaurant service businesses. During the past year, a representative period, in the course and conduct of its business operation, Respondent purchased and caused to be shipped directly from firms located outside the State of New York to its facilities at John F. Kennedy International Airport and LaGuardia Airport, New York, New York, food products, supplies, and other goods and products valued in excess of $50,000.

The parties have stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Air Transport Lodge 1894, herein called Lodge 1894, is, and has been at all times material herein, a chartered local of the International Association of Machinists and Aerospace Workers, AFL–CIO, and is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Facts

On September 27, 1978, the Board certified Lodge 1894 as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees of Respondent, employed at its Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

At all times since September 27, 1978, Lodge 1894 has been, and is presently, the exclusive collective-bargaining representative for the employees in the above-described unit.[2]

On March 28, 1981, Respondent unilaterally raised the existing wages by 10 percent and granted an additional sick day to its employees in the above-described unit, without prior notice to the IAM and Lodge 1894, and without having afforded them an opportunity to negotiate and bargain with Respondent concerning such changes.

B. Contentions of the Parties

The General Counsel contends that Respondent violated Section 8(a)(5) and (1) by unilaterally granting the wage increase and additional sick day discussed above. Respondent contends that it engaged in the above conduct pursuant to its established practice of improving the wage-

[2]See *Marriott I, supra*, where the Board made the same finding.

benefit package of its employees on a yearly basis at each of its facilities in the United States in order to keep its employment standards on a par with area standards. Respondent further contends that it engaged in the alleged unlawful conduct pursuant to its past practice of effectuating a nationwide policy to increase benefits on a yearly basis. Respondent also contends that on October 12, 1979, it withdrew recognition from Lodge 1894 as the exclusive collective-bargaining representative of the unit employees, based on Respondent's alleged good-faith doubt that Lodge 1894 represented a majority of the unit employees. Respondent further submits that it continued to withhold recognition from Lodge 1894 based on that good-faith doubt. Respondent did not file a brief in support of its contentions, and neither the IAM nor Lodge 1894 filed briefs.

C. Conclusions

In accordance with the decisions in *Marriott I and Marriott II, supra,* we find initially that Lodge 1894 has been at all times material herein the exclusive collective-bargaining representative for the employees in the above-described unit. We also find, consistent with our earlier decisions, that Respondent did not have a reasonably based good-faith doubt when it withdrew recognition of Lodge 1894.

Further, we reject Respondent's contention that the wage increase and the additional sick day were granted pursuant to a policy of making annual improvements in wages and benefits in order to keep Respondent's employment standards on a par with area standards. The record discloses no evidence of such a policy.[3]

[3]As previously noted, Respondent did not file a brief in support of its contentions.

In view of the foregoing, we find that Respondent violated Section 8(a)(5) and (1) by granting unit employees a 10-percent wage increase and an additional sick day without prior notice to Lodge 1894 and without having afforded Lodge 1894 an opportunity to negotiate and bargain with Respondent concerning such changes.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact, conclusions, and the entire record, we make the following:

Conclusions of Law

1. Marriott In-Flite Services, a Division of Marriott Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL–CIO, and Air Transport Lodge 1894, are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. All employees of Respondent employed at its Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Air-

port and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for collective bargaining pursuant to Section 9(b) of the Act.

4. At all times since September 27, 1978, Air Transport Lodge 1894 has been the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By granting unit employees a 10-percent wage increase and an additional sick day without prior notice to Lodge 1894 and without having afforded Lodge 1894 an opportunity to negotiate and bargain concerning such changes, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1), we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. We shall order Respondent to bargain upon request with Lodge 1894 with respect to the unilateral changes concerning the employees' wages and the additional sick day and embody in a signed agreement any understanding which may be reached.

We shall also order Respondent to cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Marriott In-Flite Services, a Division of Marriott Corporation, New York City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Implementing changes with respect to the wages and sick days of employees without notifying Air Transport Lodge 1894 and without affording Air Transport Lodge 1894 an opportunity to bargain over such changes; provided, however, that nothing in this Order sahll be construed to require Respondent to withdraw any increased benefits found herein to have been granted unlawfully.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with Air Transport Lodge 1894 as the exclusive representative of the employees in the above-described unit with respect to changes in wages, rates of pay, hours, and other terms and conditions of employment, and embody in a signed agreement any understanding which may be reached.

(b) Post at its New York City, New York, place of business copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

---

[4]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. September 14, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT implement changes with respect to the wages and sick days of employees without notifying Air Transport Lodge 1894 and without affording Air Transport Lodge 1894 an opportunity to bargain over such changes. Air Transport Lodge 1894 is the exclusive bargaining representative in the following appropriate bargaining unit:

> All of our employees employed at our Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with Air Transport Lodge 1894 as the exclusive representative of the employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment and, upon request, embody in a

signed agreement any final understanding reached by the parties.

MARRIOTT IN-FLITE SERVICES,
A DIVISION OF MARRIOTT CORPORATION

_____
(Employer)

Dated_____ By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11241, Telephone 212-330-2862.

APPENDIX D

259 NLRB No. 17

FJZ
D–8280
New York,
NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

MARRIOTT IN-FLIGHT SERVICES, A
DIVISION OF MARRIOTT
CORPORATION,

and

Case 29-CA-7913

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO.

DECISION AND ORDER

Upon charges duly filed by International Association of Machinists and Aerospace Workers, AFL–CIO, hereinafter referred to as the IAM, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 29, issued a complaint and notice of hearing, dated May 16, 1980, against Marriott In-Flite Services, a Division of Marriott Corporation, hereinafter referred to as Respondent. The complaint alleges that Respondent has engaged in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and

notice of hearing were duly served on the parties. Respondent filed an answer to the complaint, denying that it committed any unfair labor practices and setting forth certain affirmative defenses.

Thereafter, the parties entered into a stipulation of facts and jointly petitioned the Board to transfer this proceeding directly to the Board for findings of fact, conclusions of law, and an order. The parties stipulated that the charge, the complaint, and the answer, as well as the transcripts and exhibits in *Marriott In-Flite Services, a Division of Marriott Corporation,* 258 NLRB No. 99 (1981),[1] constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. The parties also waived a hearing before, and the making of findings of fact and conclusions of law by, an administrative law judge, and the issuance of an administrative law judge's decision.

On January 27, 1981, the Board issued its order approving the stipulation and transferring the proceeding to the Board. Thereafter, counsel for the General Counsel filed a brief in support of his position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, including the exhibits, the brief, and the entire record in this proceeding, and hereby makes the following:

---

[1]In that case the Board found, *inter alia*, that Respondent engaged in bad-faith bargaining, unlawfully implemented certain unilateral changes, and engaged in an unlawful withdrawal of recognition. The Board also found that Respondent did not have a reasonably based good-faith doubt as to Lodge 1894's continued majority status.

Findings of Fact

I. The Business of Respondent

Respondent has at all times material herein been a Delaware corporation, with its principal office and place of business in Washington, D.C., and with various other places of business in the States of Maryland, New York, Florida, California, and other States. Respondent is, and has been at all times material herein, engaged in the airline catering, hotel, and restaurant service businesses. During the past year, a representative period, in the course and conduct of its business operations, Respondent purchased and caused to be shipped directly from firms located outside the State of New York to its facilities at John F. Kennedy International Airport and LaGuardia Airport, New York, New York, food products, supplies, and other goods and products valued in excess of $50,000.

The parties have stipulated, and we find, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL–CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Air Transport Lodge 1894, herein called Lodge 1894, is, and has been at all times material herein, a chartered local of the International Association of Machinists and Aerospace Workers, AFL–CIO, and is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Facts

On September 27, 1978, the Board certified Lodge 1894 as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All employees of Respondent, employed at its Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act.

At all times since September 27, 1978, Lodge 1894 has been, and is presently, the exclusive collective-bargaining representative for the employees in the above-described unit.[2]

On March 29, 1980, Respondent raised by 11 percent the existing wages of, and granted an additional holiday to, all the employees in the above-described unit, without prior notice to the IAM and Lodge 1894, and without having afforded them an opportunity to negotiate and bargain with Respondent concerning such changes.

B. Contentions of the Parties

The General Counsel contends that Respondent violated Section 8(a)(5) and (1) by unilaterally granting the wage in-

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[2]See *Marriott In-Flite Services, a Division of Marriott Corporation, supra*, where the Board made the same finding.

crease and additional holiday discussed above. Respondent contends that it engaged in the above conduct pursuant to its established practice of improving the wage-benefit package of its nonrepresented employees on a yearly basis at each of its facilities in the United States in order to keep its employment standards on a par with area standards. Respondent further contends that it engaged in the alleged unlawful conduct pursuant to its past practice of effectuating a nationwide policy to increase benefits on a yearly basis. Respondent also contends that on October 12, 1979, it withdrew recognition from Lodge 1894 as the exclusive collective-bargaining representative of the unit employees, based on Respondent's alleged good-faith doubt that Lodge 1894 represented a majority of the unit employees. Respondent further submits that it continued to withhold recognition from Lodge 1894 based on that good-faith doubt. Respondent did not file a brief in support of its contentions, and neither the IAM nor Lodge 1894 filed briefs.

C. Conclusions

In accordance with our decision in *Marriott In-Flite Services, a Division of Marriott Corporation, supra,* we find initially that Lodge 1894 has been at all times material herein the exclusive collective-bargaining representative for the employees in the above-described unit. We also find, consistent with that decision, that Respondent did not have a good-faith doubt when it withdrew recognition of Lodge 1894.

Further, we reject Respondent's contention that the wage increase and the additional holiday were granted pursuant to a policy of making annual improvements in wages and benefits in order to keep Respondent's employ-

ment standards on a par with area standards. The record discloses no evidence of such a policy.[3] We note further that the alleged policy as set forth in the stipulation applies only to Respondent's "non-represented" employees, and, as we have found, Lodge 1894 has been at all times material herein the collective-bargaining representative of the unit employees.

In view of the foregoing, we find that Respondent violated Section 8(a)(5) and (1) by granting unit employees an 11-percent wage increase and an additional holiday without prior notice to Lodge 1894 and without having afforded Lodge 1894 an opportunity to negotiate and bargain with Respondent concerning such changes.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead, and have led, to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact, conclusions, and the entire record, we making the following:

Conclusions of Law

1. Marriott In-Flite Services, a Division of Marriott Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[3]As noted previously, Respondent did not file a brief in support of its contentions.

2. International Association of Machinists and Aerospace Workers, AFL–CIO, and Air Transport Lodge 1894, are, and at all times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

3. All employees of Respondent employed at its Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for collective bargaining pursuant to Section 9(b) of the Act.

4. At all times since September 27, 1978, Air Transport Lodge 1894 has been the exclusive representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By granting unit employees an 11-percent wage increase and an additional holiday without prior notice to Lodge 1894 and without having afforded Lodge 1894 an opportunity to negotiate and bargain concerning such changes, Respondent has violated Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1), we shall order that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. We shall order Respondent to bargain upon request with Lodge 1894 with respect to the unilateral changes concerning the employees' wages and the additional holiday, and embody in a signed agreement any understanding which may be reached.

We shall also order Respondent to cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Marriott In-Flite Services, a Division of Marriott Corporation, New York City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Implementing changes with respect to the wages and holidays of employees without notifying Air Transport Lodge 1894 and without affording Air Transport Lodge 1894 an opportunity to bargain over such changes; provided, however, that nothing in this Order shall be construed to require Respondent to withdraw any increased benefits found herein to have been granted unlawfully.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with Air Transport Lodge 1894 as the exclusive representative of the employees in the above-described unit with respect to changes in wages, rates of pay, hours, and other terms and conditions of employment, and embody in a signed agreement any understanding which may be reached.

(b) Post at its New York City, New York, place of business copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 29, in

[4]In the event that this order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. November 3, 1981

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT implement changes with respect to the wages and holidays of employees without notifying Air Transport Lodge 1894 and without affording Air Transport Lodge 1894 an opportunity to bargain over such changes. Air Transport Lodge 1894 is the exclusive bargaining representative of the employees in the following appropriate bargaining unit:

> All of our employees employed at our Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with Air Transport Lodge 1894 as the exclusive representative of the employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment and, upon request, embody in a

signed agreement any final understanding reached by the parties.

MARRIOTT IN-FLITE SERVICES, A DIVISION OF MARRIOTT CORPORATION

_____

(Employer)

Dated_____ By_____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11241, Telephone 212-330-7709.

APPENDIX E

258 NLRB No. 99

FJZ
D–8015
New York, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

MARRIOTT IN-FLIGHT SERVICES, A
DIVISION OF MARRIOTT
CORPORATION,

and

Case 29-CA-7541

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO.

DECISION AND ORDER

On September 17, 1980, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and an answering brief to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to modify his recommend-

ed remedy,[1] and to adopt his recommended Order as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Marriott In-Flite Services, a Division of Marriott Corporation, New York City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified herein:

1. Substitute the following for paragraph 1(b):

"(b) Unilaterally implementing collective-bargaining proposals or tentative agreements, without the consent of the Union absent a valid, preexisting impasse in bargaining; provided, however, that nothing in this Order shall be

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[1]We do not adopt the Administrative Law Judge's recommendation that Respondent be required to reimburse the Union for its "reasonable costs of participating in the collective bargaining negotiations." An award of litigation and other expenses is appropriate only when a respondent raises patently frivolous defenses. *Tiidee Products, Inc.*, 194 NLRB 1234 (1972). Respondent's defenses here to the 8(a)(5) allegations, although nonmeritorious, are not patently frivolous.

[2]The Administrative Law Judge erroneously included in pars. 1(b) and 2(b) of his recommended Order a provision that Respondent not make any unilateral changes in benefits without first "affording the union a reasonable opportunity to bargain thereon." Such an order is not applicable to unilateral changes made during the course of contract negotiations. Absent a valid, preexisting impasse, or the consent of the union, an employer, during the course of contract negotiations, is not free to implement proposed changes or those tentatively agreed to by the parties. Accordingly, we shall modify par. 1(b) of the Order and delete par. 2(b) of the Order.

construed to require Respondent to withdraw any increased benefits found herein to have been granted unlawfully."

2. Delete paragraphs 2(b) and 2(d) and reletter the remaining paragraphs accordingly.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 30, 1981

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT bargain in bad faith for a collective-bargaining agreement and about other mandatory subjects of bargaining with International Association of Machinists and Aerospace Workers, AFL–CIO, as the exclusive bargaining representative in the following appropriate bargaining unit:

> All of our employees employed at our Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally implement collective-bargaining proposals or tentative agreements, or other changes in terms and conditions of employment, absent a valid, preexisting impasse in bargaining or the express consent of the Union.

WE WILL NOT originate, instigate, encourage, assist, or sponsor any efforts by employees to decertify the Union as their exclusive bargaining representative in order to avoid our obligation to recognize and bargain with the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with the Union as the exclusive representative of the employees in the above-described unit with respect to wages, hours, and other terms and conditions of employment and, upon request, embody in a signed agreement any final understanding reached by the parties.

MARRIOTT IN-FLITE SERVICES,
A DIVISION OF MARRIOTT
CORPORATION

_____
(Employer)

Dated_____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York, 11241, Telephone 212-330-7709.

JD-549-80
New York City, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

MARRIOTT IN-FLIGHT SERVICES, A
DIVISION OF MARRIOTT
CORPORATION,

and Case 29-CA-7541

INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO.

Rudolph E. DeMeo, Esq.,
for the General Counsel.

Carlton J. Trosclair, Esq.,
and *Holly Silver, Esq.*, of
Washington, D.C., for the
Respondent.

Kevin P. Quill, Esq., of
Long Island City, NY, for
the Charging Party.

DECISION

Statement of the Case

ROBERT A. GIANNASI, Administrative Law Judge: This case was tried for eight days in March 1980 in Brooklyn, New York. The Complaint alleges that Respond-

ent violated Section 8(a)(5) and (1) of the Act by failing to bargain in good faith with Local Lodge No. 1894, International Association of Machinists and Aerospace Workers, AFL-CIO (hereafter the Union) by its overall bargaining conduct, by unilaterally changing existing personnel policies, by failing to meet at reasonable times, by originating, instigating, encouraging, assisting and sponsoring the circulation of decertification petitions, and by withdrawing recognition of the Union which had been certified by the Board as the exclusive bargaining representative of its employees. The Respondent denied the essential allegations of the Complaint. The parties filed briefs.

Based on the entire record herein and the testimony of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of Respondent

It is admitted that Respondent, a Delaware corporation, has its principal office and place of business in Washington, D.C. and operates in various states where it is engaged in the airline catering, hotel and restaurant service industries. During the year prior to the issuance of the Complaint, Respondent purchased and caused to be shipped directy from firms located outside New York State to its facilities at John F. Kennedy International Airport and La Guadia Airport, New York City, New York, food products, supplies and other goods and products valued in excess of $50,000. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization

The Charging Party and the Union are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. The Facts

On September 27, 1978, after winning a Board-conducted election, the Union was certified as the exclusive bargaining representative in the following unit:

> All employees of Respondent employed at its Commissary, Kitchens and Terminal Facilities, including shops 344, 370, 371, 374, 375, 376, 377 and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in Section 2(11) of the Act.

The parties commenced negotiations on October 20, 1978 and continued to negotiate in about forty-five bargaining sessions until October of 1979.

On October 20, 1978, the parties met for their first negotiating session at the International Hotel at Kennedy Airport.[1] The Union was represented by Union President Eugene Coughlin and Chief Negotiator Tim Connolly. Respondent was represented by Carlton Trosclair, its attorney, Jeffrey Lammers, Regional Vice-President for the New York Region, and General Manager Tom Petta. The parties agreed to certain ground rules: The parties would meet on Tuesdays, Wednesdays and Thursdays of the weeks Trosclair, who was conducting other negotiations, was available; Trosclair had the authority to conclude an agreement for Respondent; and Connolly and

[1] All the negotiating sessions took place at this or other hotels near Kennedy Airport or at the Lodge 1894 union hall.

Coughlin had the authority to conclude an agreement for the Union, subject to ratification by the employees.

At the first session, Connolly requested that Respondent provide the Union with certain information to aid it in bargaining. Lammers agreed and he provided the information requested over a period of time. The last information was provided in March of 1979. Union representatives did not thereafter ask for any other information. Although the General Counsel and the Union suggested at the hearing that Respondent did not provide all the information requested, they did not repeat this contention in their briefs. The testimony of Coughlin and Connolly on this issue was vague and I credit Lammers' clearer testimony that he provided all the information requested and that, after March 1979, the Union representatives did not indicate that they needed any more information or that the information provided was not adequate.

At the initial session, Connolly proposed that the parties discuss non-economic items first and that they discuss economic items later. Trosclair did not object to this arrangement. Connolly also presented Trosclair with a copy of proposed article numbers and titles which Connolly suggested that the parties use as a format for the negotiations.

At the second negotiating session, on November 1, 1978, Connolly presented Respondent's negotiators with a form contract which, he stated, contained "standard language that we had in one agreement." Among the clauses in the form contract were proposals on union security, basically a union shop clause, and dues checkoff. There were other proposals on such matters as seniority, grievances, strikes and lockouts. There was also a blank article on wage rates. Connolly had told Trosclair that the

Union was not seeking wage levels comparable to those which airlines were paying to employees represented by Charging Party but that he expected a wage agreement comparable to that negotiated between the Charging Party and two other caterers at the New York airports, Air-La-Carte and Strato-Dine.

The third and fourth negotiating sessions took place on November 20 and 21, 1978. On November 20, Respondent presented its first contract proposal which contemplated a one year agreement. This proposal included provisions on no-strike and no-lockout, discharges and grievances, leaves of absences and many other aspects of the employment relationship. The proposal did not include provisions concerning union security, checkoff of union dues, seniority, hours of work, jury duty, wage rates, sick pay, holidays, vacations, insurance, pension, and funeral leave.

At the third session, the parties agreed that any contract reached would be for a duration of one year.[2] The parties also discussed the remainder of the Respondent's proposals, but reached few, if any, other agreements.

The parties met again on December 4 and 5, 1978. They discussed primarily the issue of seniority. On December 5, however, Respondent's negotiators mentioned that Respondent was putting into effect a nationwide dental plan for employees and that it desired to do so in New York, as well, with the Union's approval. Connolly initially objected to the implementation of the dental plan, but he subsequently agreed that it could be put into effect in New York. However, he reserved the right to bargain on the coverage and the cost to employees of the dental plan.

[2]At a subsequent bargaining session, the Respondent made a proposal which contained a three year duration clause. The Union objected and Respondent later reverted to the one year duration clause.

Respondent agreed with Connolly's reservation. There is testimony that the parties also discussed the implementation of two other nationwide changes in the New york unit: improvements in term life insurance and funeral leave. There is no evidence that the Union objected to the implementation of the insurance and funeral leave improvements. The Union never thereafter made any proposal to alter the dental plan or the other improvements mentioned on December 5.[5]

At the end of the December 5 meeting, the Union representatives expressed an interest in negotiating through the end of the year. Respondent's representatives objected because they had other commitments and the holiday season was approaching. The parties agreed to meet again for 3 days beginning January 9, 1979.

Effective January 1, 1979, the Marriott Corporation implemented the dental plan presented to the Union on December 5 for all hourly and salaried employees in all its divisions – a total of 66,000 employees. At the same time,

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[5]I reject any implication in the testimony of Connolly and Coughlin that the Union did not agree to the implementation of the dental plan or that Respondent suggested that the plan would be implemented whether or not the Union agreed. Coughlin was quite vague on this point and Connolly seemed to be tailoring his testimony to fit a litigation theory. Lammers was, on the other hand, quite clear and reliable when testifying that the Union agreed to the implementation of the dental plan with the reservations mentioned above. Connolly agreed that the Union reserved the right to bargain over certain aspects of the dental plan. And Coughlin's notes of the December 5 meeting do not mention discussion of the dental plan at all. Had a serious dispute arisen over implementation of this benefit, surely it would have been recorded by Coughlin. An additional factor supporting my view is that there is absolutely no testimony that the Union objected to the implementation of the other benefits, although it is clear from Lammers' testimony that the parties discussed these other benefits on December 5.

the Marriott Corporation implemented improvements in term life insurance and in funeral leave for all of its employees.[4]

When the parties met again on January 9, 10 and 11, 1979, they primarily discussed seniority. On January 10, however, the Union submitted rates of pay for Pan American, TWA and Air-La-Carte employees whom it represented and who, the Union believed, did work similar to that of unit employees. Connolly said the Union would not press for the higher airline rates but was more interested in the lower Air-La-Carte rates. Trosclair said that the Union's approach was a realistic one but gave no indication that Respondent approved the lower rates.

The parties met again on January 30 and 31, 1979. On January 30, Gene White, Vice-President of Personnel Relations, joined the negotiations and stated that he would be Respondent's Chief spokesman when Trosclair was absent. On January 31, 1979, Respondent presented the Union with its second contract proposal.

On March 5, 1979, the Respondent presented the Union with its third contract proposal. By the end of the March 5 session the parties had reached agreement on a number of articles including seniority, leaves of absences and management rights.

On March 6, 1979, the Union presented Respondent with economic proposals dealing with overtime and holidays. On March 28, 1979, the Respondent presented the Union with its fourth contract poposal.

[4]During the period from September 1, 1978 through October 15, 1979, the Respondent employed some 6,300 people in the In-Flite Services Division. In the New York area, the Division employed about 187 employees in its terminal facilities and 577 employees in its non-terminal facilities.

On March 20, 1979, the parties discussed the Respondent's practice of granting annual wage increases at the beginning of April. For the past ten years Respondent had granted its New York employees a wage increase in April as part of a nationwide policy of granting annual wage increases. The testimony is unclear as to who brought up the subject of the annual wage increase on March 20. Neither Connolly nor Coughlin was asked about any discussion of wages on March 20. Lammers testified that White brought the matter up and proposed that a wage increase be implemented as of April 1, 1979. Connolly objected. No precise amount was mentioned. White testified that Union negotiators brought the issue up and he agreed to look into the matter.

The wage increase issue was brought up again on March 29, 1979. At this point, Respondent's negotiators mentioned that the wage increase figure which Respondent wished to put into effect was 8 percent. Again, as in the dental plan discussions, there is a conflict in testimony as to whether Respondent's officials said they were going to put the increase into effect on April 1 or whether they asked the Union if it would agree that it be put into effect. There is no doubt that Connolly initially objected to the implementation of the 8 percent wage increase. However, in analyzing the testimony of Connolly, Coughlin, Petta, White and Lammers in the context of the negotiations and its clarity and inherent reliability, I conclude that, after some discussion, Connolly agreed to Respondent's implementation of the 8 percent wage increase provided that the parties could bargain further on wages. Trosclair also indicated that the Union would have a good argument for making any wage increase agreed to in the future retroactive. Trosclair offered to put these understandings into writing but Connolly said that this was not necessary. The

Union never thereafter submitted a wage proposal or objected to implementation of the wage increase.[5]

On April 1, 1979, Respondent implemented an 8 percent wage increase for all employees in the New York Region, including the unit employees represented by the Union.

On April 24, 1979, Respondent presented its fifth contract proposal. At this session Respondent agreed to a provision for an 8-hour day with overtime after 8 hours which was part of the Union's overtime proposal. Respondent also implemented a change in overtime policy throughout its nationwide facilities with the exception of the bargaining unit. The Respondent issued the following memorandum, dated April 24, 1979, to its employees:

> On April 23, 1979, the company announced to in-flite employees throughout the United States that effective May 12, 1979, the employees will begin receiving time and a half rates of pay for any hours worked in excess of 8 hours in a regular scheduled work day. For those few employees scheduled to work four 10 hours days, the overtime rates will be paid for all hours worked in excess of ten hours in a regular scheduled work day.
>
> It is the intention of the company that the New York in-flite employees be included in this economic benefit. Today, April 24, 1979, the company announced to the IAM that it was agreeable to paying time and a half rates of pay for any

[5]Indeed, there is some testimony by White, supported by his notes, that Connolly thereafter affirmed his non-objection to implementation of both the dental plan and the wage increase. That the Union grudgingly agreed to implementation of the wage increase is supported by its similar action in approving implementation of the dental plan and insurance and funeral leave changes in December and by its obviously different positions in subsequently objecting, in a clear and concise manner, to implementation of overtime and meals policy changes.

hours worked in excess of 8 hours in a regular scheduled work day. Again, for those few employees scheduled to work for 10 hour days the overtime rates will be paid for all hours worked in excess of 10 hours in a regular scheduled work day.

Due to the labor laws, the company could not advise you of this improved economic benefit before making this presentation to the IAM.

There are many false rumors going around the shoppes which cause needless worry on the part of too many people. Please feel free to ask any questions that you may have about your job, your future and your pay rates/benefits. The company will continue to keep you informed of future developments.

The evidence shows that this memorandum was posted at Respondent's New York facilities and distributed to employees with their paychecks.

At this point in the negotiations neither side had made a wage offer. There had been no negotiations – outside of some preliminary discussions – on the Union's proposals for union shop and dues checkoff clauses.[6] At the April 25

[6]In their very first telephone conversation setting up the first negotiating meeting, Coughlin had mentioned to Trosclair that the Union was primarily interested in a union shop and dues checkoff provision. Trosclair said if the Respondent could get a strong no-strike clause the parties should be able to work out union security, possibly a maintenance of membership clause. He said that Respondent would not agree to a union shop clause.

Later, relatively early in negotiations, the parties discussed the Respondent's ability to check off dues under its payroll procedure. Lammers stated that he had operated under a dues checkoff procedure before in a facility operated by Respondent in Puerto Rico. This was apparently a facility which Respondent had purchased from another employer. Respondent had entered into a successorship bargaining relationship and carried over the union security and dues checkoff provision of the prior agreement.

session, Respondent's negotiator, Gene White, rejected the Union's union shop, union security and dues checkoff proposals. According to his testimony, he said in effect that "these items at this time might not be necessary because of the closeness of the election." White did state that he considered the item still open for further discussion.

On April 26, the parties ended their negotiations at about 7:15 p.m. White was the only company negotiator. The Union negotiators pressed for continued negotiations but White begged off. At this session the parties discussed overtime and no-strike and no-lockout issues, reached agreement on part of the grievance clause and the vacation issue. White stated that Respondent had been giving all day, and, since he believed that the Union was not going to give, he preferred to break off negotiations for that night and resume the next morning.

The next morning, April 27, the parties met for about an hour. At this session, Trosclair, who had just rejoined the negotiations, stated that he would review the negotiations and would meet again with the Union on April 30, 1979 for the purpose of concluding an agreement. Coughlin objected, stating that the parties could conclude the negotiations in a few hours if they remained and bargained. Trosclair insisted that he needed time to review the proposals and agreements reached and the session ended.

On April 30, the parties met again. Trosclair stated that the "powers to be" had told him it was time for the Union to move on some of the open items. He also said that Respondent was firm and was not going to move further. Connolly stated that the Union would have to consider its position and see what it was going to do. After this

meeting, Connolly telephoned the Federal Mediation and Conciliation Service to secure the assistance of a federal mediator.

During negotiations, both Respondent and the Union met with employees and notified them about the progress of negotiations. Respondent not only distributed and posted notices, but also utilized a newspaper, the "Marriott mini news," which reported news of the negotiations in both English and Spanish. In the May 1979 editions the following appeared:

Recent Wage & Benefit Changes

Within the past six months, the following improvements in wages and benefits for New York In-Flite and Terminal employees were announced by the company to the union negotiators and *were implemented after the union did not object to their implementation.*

1. New Dental Plan – effective 12/30/78

2. Expanded Funeral Leave Coverage – effective 12/30/78

3. Improved Term Life Insurance Options – effective 12/30/78

4. An 8% Wage Increase – effective 3/31/79

5. Improved Overtime Pay Provisions – effective 5/12/79

The company wants each employee to get the full value from these improved wages and benefits. If you have any questions about how any of these improvements apply in your specific case, please feel free to ask your General

Manager or Regional Personnel Manager. We want to know.[7]

On May 8, 1979, the parties met again in the presence of the federal mediator. Trosclair held firm to the position that Respondent was not going to move any further on its contract proposals.

On May 9, 1979, Respondent sent the following telegram to Union President Coughlin:

Subj: Contract Negotiations

Please be advised that the company is agreeable to implementing time and a half rates of pay for any hours worked in excess of eight hours in a regular scheduled work day. For those few employees scheduled to work four ten-hour days the overtime rates will be paid for all hours worked in excess of ten hours in a regular scheduled work day. This offer is in basic agreement with your proposal.

As was explained to you in our negotiating meetings this benefit will also become effective May 12, 1979 throughout the United States In-Flite System except in the New York area that is covered by the negotiations. We are willing to implement this benefit for our employees and for your members effective May 12, 1979 as was previously stated to you providing you give us the Union's approval in writing.

CC: William Bailey
Cliff Ehrlich

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[7]There is no specific evidence as to when this issue was distributed but the contents of the document strongly suggests that it was distributed in early May. One item mentions that the next negotiating session was scheduled for May 8.

On May 10, 1979, Respondent issued the following memorandum, addressed to all employees:

> On Wednesday, May 9, 1979, the company and the Union met in the presence of a Federal Mediator for further negotiations. During this session, the company again asked the union to agree to the implementation of the systemwide policy, effective May 12, 1979, of providing for payment of time and one half for any hours worked in excess of 8 hours for those people normally scheduled to work 8 hours. The union neither agreed nor disagreed to this implementation.
>
> Because of legal requirements, the company cannot actually implement this policy in New York until the union makes up its mind. The company has sent a request (copy below) to the union asking it to state its position. The company still hopes to implement this policy as previously announced.
>
> Thank you for your understanding.

At the May 16, 1979 negotiating session, White stated that Respondent wanted to implement, as soon as possible, a change in its overtime procedure to provide for an 8-hour day with time and a half after 8 hours. Connolly objected, stating that this was only part of the Union's overtime proposal and that the remainder of the Union's proposal was still on the bargaining table. He objected to Respondent's piece-meal implementation of an agreed-upon bargaining item. At this meeting, however, the Union dropped most of its open proposals and concentrated only on four of them: Union security; dues checkoff, a wage increase, and free meals for all unit employees. Connolly apparently dropped the remainder of the Union's overtime proposal at the end of this meeting.

On May 17, 1979, the parties met again and Respondent moved on several issues. Respondent agreed that it would ask employees to work overtime based on seniority and if they refused, it would assign the junior man to do the work. Respondent also offered to reduce the probationary period to 75 days, to eliminate the 30-cent meal charge, in accordance with the Union's proposal, and to grant a 6-hour rest period between shifts with overtime to be paid to an employee until he obtained 6 hours rest between shifts. Trosclair rejected the Union's union security proposal because, he said, Respondent did not feel that the Union had employee support. Trosclair stated that Respondent had gone as far as it was going to go and that the Union should bring the contract back to the employees for ratification. Connolly said that the Union was not finished with negotiations and that union security, dues checkoff and wages were still open. Connolly stated that the Union would take what was described as the Respondent's final offer under consideration and notify the Respondent what it decided. The meeting ended without the parties having agreed upon the date for another negotiating session. This was left to the mediator.

On May 24, 1979, Respondent issued a memorandum, addressed to all employees, which stated that, as of that date, the Union had still not agreed to the implementation of Respondent's previously announced nationwide benefit of time and a half for hours worked in excess of a regularly scheduled workday, and, therefore, that Respondent had been unable to begin paying this improved benefit. The memorandum also stated that Respondent still hoped to implement this policy at a future date retroactive to May 12, 1979, as previously announced.

The Respondent also issued a memorandum dated May 25, 1979, addressed to all employees, which listed 14 items

included in the employer's final offer of May 17, 1979, and stated that, as of May 25, 1979, the Union had neither agreed nor disagreed with Respondent's final proposal, that the Respondent felt that "the present proposals are fair and equitable and will continue to insure fair treatment for each of you," and that it was the Respondent's intent "to continue providing you with jobs and job security through the continuation of service which we provide to our customers." The memorandum also invited employees to ask any questions that they might have about the final contract proposal.

On May 31, 1979, Respondent sent the Union a phone-delivered telegram which stated that, in its view, an impasse was reached on May 17, 1979, and due to the fact that the impasse could not be broken, Respondent planned to implement the economic terms offered to the Union on May 17, 1979, effective June 2, 1979 in the case of the free meals and May 12, 1979 in the case of time and one half for all work performed after an employee's regularly scheduled 8-hour workday. Respondent's implementation of the free meals change affected its approximately 577 non-terminal employees in the New York area. Respondent's implementation of the overtime change affected the 6,300 employees in its In-Flite Division.

Respondent also issued a memorandum, dated June 1, 1979, addressed to all employees, which stated that, as of May 31, 1979, Respondent and the Union still had not agreed to a contract, that Respondent had made a final offer to the Union on May 17, 1979, and, that having reached an impasse, Respondent could unilaterally implement the payment of the improved overtime benefit retroactive to May 12, 1979. The memorandum also stated that Respondent appreciated the employees' patience in the

delayed implementation of this benefit, and that Respondent was also pleased to announce that, effective June 2, meal charge was being eliminated for all New York In-Flite employees.

During negotiations, the Union and Respondent negotiators discussed the possibility of a strike of Respondent's employees. The testimony as to who initiated this st... talk, when it was initiated, and in what context is so co...using, self-serving and imprecise that I am unable to make any specific findings as to when it was initiated, by whom it was initiated, or what were the precise dimensions of these discussions. There is, however, some documentary evidence concerning the strike issue which is set forth below.

On April 26, 1979, Respondent issued for the New York employees, a special edition of the "Marriott mini-news," both in English and Spanish, which discussed the possibility of a strike and the consequences of a strike to both Respondent and the employees. Respondent treated the issue again in a May 11, 1970 special edition of the "Marriott-mini-news." The General Counsel mentions these documents in his brief but makes no specific allegation that their contents were unlawful.

After May 17, 1979, the Union, in its meetings with employees, had discussions about possible strike action. One such meeting was scheduled for May 29, 1979. The Union also notified employees of a special meeting to be held on June 19, 1979 which was specifically called, according to the notice introduced in evidence, "to establish a date for a STRIKE." A strike was never authorized and the employees did not strike.

The parties met again on July 10, 1979. They delineated open issues, most of which were based on Respondent's

non-economic proposals. A union bulletin distributed to employees after the meeting confirmed that there were some 26 open items, only three of which were union proposals. Those were union security, dues checkoff and wages. On July 19, Respondent presented its first version of a sixth contract proposal. There were a number of changes from its earlier proposal submitted on April 24. A covering letter stated that economic proposals would be made in future negotiations. The parties clarified certain issues and entered into some agreements including the article on classification.

On July 26, 1979, the Union offered to change its union shop proposal to a standard maintenance of membership clause with a one year escape clause. Trosclair rejected the offer but stated that it might be considered significant by the "powers that be" and that he would take the proposal back to his superiors in Washington to see what their views might be. White stated that Respondent was opposed to the maintenance of membership proposal because Respondent did not feel that the Union had majority support of the employees. Connolly told Trosclair that the Union would agree to union security provisions in a contract which Respondent had in effect in Kansas City. Trosclair asked "Would you take the wages, too?" But Connolly refused since the wages in that agreement were considerably lower than the New York wages. Connolly also raised the dues checkoff issue, but Trosclair said that Respondent would not agree to a dues checkoff clause.

The parties met again on August 16, 1979. The parties discussed the maintenance of membership and no-strike proposals without reaching agreement.

On August 27, 1979, Respondent presented the Union with its second version of a sixth contract proposal. This proposal had several changes from the earlier proposal, in-

cluding a provision on hours of service, which was labeled economics, and an expanded Article XV, which included provisions of sick leave. The Union dropped its dues checkoff proposal and the parties agreed on some changes in the discharge article. The Union apparently agreed to the hours of service and sick leave provisions at this meeting.[8] Trosclair stated that Respondent wanted the Union to agree to all of Respondent's open proposals as a final contract without a wage increase and without union security. Connolly declined, stating that there were many open items and loose ends to resolve before the contract could be submitted for ratification. Trosclair, speaking for Respondent, reiterated that Respondent had made its final offer and asked the mediator to call him when the Union was ready to sign the agreement.

After the August 27 meeting, the parties agreed to try to set up a meeting between Respondent's Washington-based officials and the Union's International officials in Washington. A meeting was arranged and, sometime in September, International Union Representative William Sherry met with two of Respondent's officials at a Washington restaurant. They discussed basically three issues: wages, union security and dues checkoff. Sherry testified that he understood there were ten or twelve other open issues at this point. Sherry pressed a maintenance of membership clause as an appropriate provision for union security. Respondent's officials stated their objection to any form of union security. Sherry also pressed for a larger wage increase than the 8 percent already granted for the year 1979. Respondent refused to grant a larger in-

[8]My conclusion on this point is based on the fact that GC Exhibit 18, the contract proposal presented by Respondent on October 9, indicated agreement on this issue and the parties had not met to negotiate since August 27 except for an aborted session on October 2 at which no agreements were reached.

crease. Respondent also refused to agree to any dues checkoff provision.

Sherry then called Coughlin, told him there was no deal on the open items the Union was seeking. He told Coughlin to contact Tim Connolly and get back into negotiations, resolve the open items and put the agreement out for ratification. Sherry also called Connolly to tell him basically the same thing. As a result the Union arranged for another meeting with Respondent on October 2.

On October 2, 1979, Union and Company negotiators met in a room in the Hilton Hotel at Kennedy Airport. Connolly objected to negotiating in a hotel bedroom. Trosclair responded that he was under the impression that the parties were going to sign a contract which Respondent had prepared encompassing its last offer. Connolly disagreed and stated that he was prepared to negotiate further on the open items. The Respondent presented the Union with a contract proposal which was not discussed at all. Nothing was resolved at this meeting except that the Union insisted on another meeting which was arranged, through the mediator, for October 9, 1979.

The parties met on October 9. Gene White was the chief spokesman for Respondent. Connolly and Coughlin represented the Union. At the beginning of this meeting, Respondent presented the Union with a contract proposal which amounted basically to a list of Respondent's open items. There were six clauses that had not been agreed upon, including the duration clause which stated that the agreement was to run for one year from the date of ratification. The Union negotiators agreed to all of Respondent's proposals and withdrew all of its remaining proposals. However, at this time, Connolly brought up the duration issue as well as the annual wage increase for April

1980. He said that, in order to secure ratification of the agreement, the Union had to explain to the employees what they could expect in terms of wages the following April when the Respondent gave its usual annual increase to the New York employees. He pointed out that the duration clause had no specific date and that the contract had no wage provision. He said if the one year contract, which the Union had agreed to, ran from the date of ratification, it would have no provision for wages the following April. The Respondent's proposal had no wage provision and a covering letter attached to the proposal stated that economic proposals would be made in future negotiations. On the other hand, Connolly stated, if the contract ran from March 31, 1979, the parties could contemplate negotiating the April raise at the expiration of the contract. Connolly asked White to make a decision on this matter. He also stated that, if the Respondent decided that the contract should run from the date of ratification, he would be agreeable to Respondent writing into the contract whatever wage increase figure it desired for the following April. He insisted that he had to know what was going to happen with respect to a wage increase in April of 1980. White asked for some time to consult his superiors in Washington on the matter. Connolly objected and said a simple phone call would suffice but the parties ended the meeting with an agreement to meet again on October 15, 1979.[9]

[9]White conceded that, at this meeting, Connolly did request that the contract expire in March, 1980, and that he wanted to think about the consequences of that request. He did not specifically deny Connolly's testimony that Connolly also presented an alternative, that is, that, if the contract ran for one year from the date of ratification, Respondent indicate in the contract something about the prospective wage increase the following April.

To the extent that White's version of the October 9 meeting differs from that of Connolly and Coughlin, I do not credit White. In his

Simultaneously with the negotiating session set forth above, on October 9, 1979, Jeff Lammers held briefings with local and Washington-based officials of Respondent in which he explained that meetings were going to be held for all unit employees in small groups to explain to them the method of going about decertifying the Union. He stated the employees would be provided with booklets describing decertification together with form petitions stating that employees did not want the Union to represent them. Lammers also briefed the general managers of each of the shops on a prepared speech they were to present at these employee meetings which were to begin on October 10. The speech and the booklet were written only in English. Washington officials were to be present at these meetings as observers. Lammers testified that two of these briefings were held before he learned the results of the Oc-

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direct testimony, White was very sketchy in describing the negotiations, particularly those after July 10, 1979, and, only on cross-examination, did he elaborate to some extent on the contract duration issue, which was, by all accounts, the major unresolved issue. Moreover, White's testimony was demonstrably unreliable. For example, he confirmed that, at the October 9 session, the Union agreed to many of Respondent's proposals, but he said that the open items were narrowed from 26 to 6, which included, according to White, union security and dues checkoff. In point of fact, General Counsel's Exhibit 18, Respondent's proposal presented to the union at the bargaining of the October 9 bargaining session, contains six open provisions. Other evidence shows that there were 26 open items at the beginning of July and that most of these were resolved by August 27. I find more plausible the testimony of Connolly and Coughlin that the Union agreed to all of the open items except for the duration clause as it affected wages. This also comports with the testimony of Lammers. Lammers testified that White reported to him the results of the negotiating session and, although he believes White reported that there were other open items, the "main one" was "the duration, the effective date." Lammers did not remember the other open items, but he characterized the duration clause as "major" because it would determine whether negotiations were reopened prior to the next annual increase date.

tober 9 negotiating session which apparently ended in the afternoon. Another briefing occurred, according to Lammers, on October 10. White testified that he attended one such briefing on October 9.

Lammers also testified that he was aware of the existence of the decertification booklet sometime in the summer of 1979. A copy of the booklet was sent to Lammers as a general matter without specific reference to the New York employees. Between October 2 and October 9, however, he had some discussions with Respondent's attorney and negotiator, Trosclair, about the booklet with specific reference to its use in New York. According to Lammers, a tentative decision was made between October 2 and October 9 to use the booklet apparently to distribute it to employees or at least to prepare the booklet for the New York employees. After speaking to his superior, a Mr. Bill Bailey, in Washington, Lammers testified he had "clear instructions to go ahead and to prepare this material."

Lammers also testified that, after the October 2 meeting, the Respondent's policy changed in responding to employees who inquired about getting rid of the Union. Prior to that time, several employees who made such inquiries were told that the Labor Board could give them that information and that the law "pretty much assumed" that the Union represented the employees for one year after the certification. After October 2, the Respondent seriously considered and eventually agreed to undertake the active presentation of decertification information and materials to employees.

On October 9, a notice to all employees entitled "SUBJECT: *Labor Negotiations*" was posted on Respondent's bulletin board. It stated in part:

> In accordance with our continued policy of keeping you informed of the status of labor negotiations, departmental meetings, in all departments, will be scheduled starting tomorrow, October 10, 1979. You are encouraged to attend these meetings. Should you have any questions, we will attempt to answer them at that time.

On October 10, 11 and 12, meetings were held for all of Respondent's employees in the bargaining unit in accordance with Lammers' instructions. The employees were called into the meetings in small groups. The general managers conducted the meetings and introduced Washington-based officials who attended the meetings as observers. An introductory speech was read in English and in Spanish. The English language version of the speech, a copy of which is in evidence, tells employees that Respondent advised the Union on October 2 and 9 that it had made its final offer on May 17, 1979 and the offer "includes all current wages and fringe benefits that are now in effect." After pointing out that Respondent was required to continue bargaining by law, the speech pointed out that "several months ago, some employees notified management that they were fed up with the union and asked what they could do to rid themselves of the union." The speech then informed the employees that "the law permits employees to decide whether they still wish to be represented by the Union." The speech continued, "A question and answer booklet (... point to the booklets...) has been prepared for any employee that is interested in finding out about his or her rights under the National Labor Relations Act. At the conclusion of this meeting and after I leave this room you may decide for yourself whether or not you would like to take one."

The booklet distributed to employees was a six-page document which contained questions and answers regarding decertification. The booklet was captioned "Notice to Employees, Decertification election, FED UP?" Attached to the booklet were form petitions in both Spanish and English which stated as follows:

> We, the undersigned, employees of the Marriott In-Flite and Terminal Shoppes serving JFK and LGA, presently represented by the International Association of Machinists and Local 1894 wish to have the National Labor Relations Board conduct an election since we believe a majority of employees in our unit no longer want to be represented by the above union.
>
> *Name* *Date*[10]

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[10]Among the questions and answers were the following:

Q. 2. Can I personally quit the union without involving my fellow employees?

A. Yes, you can personally quit the union. However, the union would still continue as your representative and could sign a contract or call a strike on your behalf. Also, under certain conditions the union could, by a contract provision, require you to contribute money to it in order to continue your employment with your employer.

Q. 6. How should the petition to "decertify" be worded?

A. Simply take lined sheets of 8½ x 11" paper and type or print the pages as per the attached sample.

Q. 7. How will we know when we have 30% of the people in our unit?

A. First, you must find out who is included in the bargaining unit. Ask your manager if you do not already know. He can tell you this fact. You and your co-workers can compile a list of the names of the employees in the unit. Then you can start

Some of the employee meetings were conducted by Juan Corrada, the general manager of Shop 377. A Washington-based management representative was pre-

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to obtain the required signatures on the petition. The voting unit will be the same unit that voted in the election on January 19, 1978. Any employees currently employed in a position that voted in the prior election may vote in the decertification election.

Q. 8. Do we need a majority of votes cast in a "Decertification" election to terminate the union representation?

A. Yes. If over 30% of the employees sign the petitions, an election can be held. However, in order to be sure that you win the election, it is recommended that you get the signature of at least 60% of the eligible employees. The 30% mentioned above represents the minimum number of signatures that the government requires in order to get involved in your case. The greater the number of signatures obtained on the petitions, the greater the possibility of getting the majority of the votes cast in an election and successfully removing or "decertifying" the union.

* * *

Q. 10 Are there time limits to when we can ask the Government for a "Decertification" election?

A. Yes. If a contract is signed between the Company and the Union, the NLRB has ruled that everyone under the contract must live with it for the length of the contract. Therefore, the best time to seek a "Decertification" election is before any contract for New York In-Flite and Terminal employees is approved.

Q. 11 When do we tell the Company, about our intent to "Decertify?"

A. You should tell the Company at the same time that you go to the NLRB. In that way, you will alert the Company that it is under no obligation to bargain or to meet any further with the I.A.M. while the decertification procedures are taking place.

sent at these meetings. Corrada supervises some 140 employees. He testified that from 60 to 75 percent were Spanish speaking. Corrada read an introductory speech to the employees in Spanish. He pointed to the decertification booklets which he said were available for employees to read and the petitions which were available for the employees to sign. He was asked questions in Spanish and answered them in Spanish. According to the uncontradicted testimony of several employees, Leiva, Mercado, Sarravia and Luna, the following took place in the question and answer session: Corrada was asked why the booklet was not written in Spanish; he said there was no time. Corrada questioned why the employees were involved with the Union and said that the Union had done nothing for the employees. Some employees interpreted his remarks as indicating that the employees should sign the petitions ousting the Union, although he did also state that the employees were not obligated to sign the petitions. For example, employee Leiva testified, credibly and through an interpreter, as follows:

> Q. Please tell the court what questions you asked Mr. Corrada exactly, and exactly what he responded to you?
>
> A. I asked Mr. Corrada why wasn't it written in Spanish, due to the fact that the majority of those present at the meeting were only reading and writing only Spanish.
>
> He replied, that there was no time.
>
> So, I told him, I couldn't sign any paper that a person couldn't understand.
>
> He insisted that that paper had to be signed. I told him that was coercing a person. Mr. Corrada asked me what that word coercion meant.

I told him that was forcing someone to commit an act which had no sense.

Mr. Corrada replied to me that it was not damaging to us.

That anyone who wants to sign it would do it.

He talked in a way, in a sense, in a manner that we interpreted like he was insisting that we should do it.

Q. Did you ask Mr. Juan Corrada any other question at the meeting?

A. Which was the reason by which – I asked him what was the reason that the company wasn't signing a contract with the Union.

Due to the fact that the only information we had – due to the fact that on the notices said only that the company is going ahead with the negotiations.

But, without giving it a valid reason that we could – that we should understand what is going on.[11]

On October 12, 1979, at about 9 or 10 a.m., lead mechanic Bruce Withrow, a former Union supporter, filed a decertification petition (Case 29-RC-322) with Region 29

[11]Corrada was called to testify but did not specifically controvert the above testimony. Respondent did call about 14 employee witnesses and asked them basically whether any management official asked or told them to sign the antiunion petition. Those who testified that they understood what the petition was or who could recall the meetings answered in the negative. Neither this evidence nor the self-serving testimony of other supervisors who testified generally about what was read or what was said in these meetings detracts from the testimony of the employees who addressed themselves to Corrada's remarks in Spanish.

of the Labor Board. He and several other employees collected signatures on the withdrawal petitions attached to the Respondent's decertification booklet which stated that the employees no longer wanted the Union to represent them. Withrow works from 8 a.m. to 4:30. His duties as lead mechanic take him "everywhere" and he is in contact with all of Respondent's New York shops in connection with energy and safety matters. There is no evidence, however, that he obtained signatures during work time. One employee testified that he was approached by an employee solicitor on work time, but there is no evidence that this was known to a supervisor of Respondent.

Withrow testified that he and several others had discussed the possibility of circulating decertification petitions, but, until the Respondent's October 10 meetings, he was unsure of whether the time was ripe for the filing of a petition. They had not drafted any language for a petition.

Withrow apparently attended one of the first decertification meetings on October 10. He told employees that he was going to solicit withdrawal petitions. He and his fellow solicitors used the English and Spanish form petitions attached by Respondent to the decertification booklet provided to employees at the decertification meetings. Withrow testified that he actually tore off the forms from the booklets provided to employees. In the next 2 days he and his fellow solicitors obtained the signatures of 416 employees.

On October 12, Respondent issued and posted a notice to all employees stating as follows:

> We have been notified by several employees that a petition has been filed with the National Labor Relations Board for a decertification election.

Sometime during the day of October 12 Respondent's negotiator Gene White called Connolly and cancelled the October 15 meeting. He stated that Connolly "blew it" and that there was a decertification petition being circulated among the employees. White said that because of the circulation of the petition Respondent doubted the Union's majority and was cancelling the October 15 meeting.[12] No further meetings were held between the parties. The Union subsequently requested bargaining and Respondent refused because of an alleged doubt of the Union's majority based on the filing of a decertification petition.

B. Discussion and Analysis

The General Counsel alleges that Respondent violated the Act by failing to bargain in good faith. I agree with the General Counsel that Respondent's conduct constitutes a violation of Section 8(a)(5) and (1) of the Act.

The applicable principles were cogently stated by the Board in *Adrian Daily Telegram,* 214 NLRB 1103, 1110-1111 (1974):

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[12]Outside of Withrow's testimony set forth above – delivered in an almost offhand manner – there is no evidence as to how many employees signed the decertification petitions. There is no evidence that he told Respondent the number of employees who signed. The documents were not placed into evidence and there is no evidence that, before White's telephone call to Union representative Connolly on October 12 in effect withdrawing recognition, Respondent made any inquiries about or had any knowledge as to the exact number of employees who had signed the petitions. White himself simply relied on the filing of the decertification petition when he cancelled negotiations in his October 12 conversation with Connolly. Therefore, it appears that Respondent relies solely on the filing of the decertification petition itself in support of its withdrawal of recognition. See *Telautograph Corp.*, 199 NLRB 892 (1972).

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees...." Section 8(d) provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...." In *N.L.R.B.* v. *Insurance Agents' Union,* 361 U.S. 477, 485 (1960), the Supreme Court recognized that "[c]ollective bargaining... is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract"; though "the parties need not contract on any specific terms ... they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." And see, Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1411 (1958). Similarly, in *N.L.R.B.* v. *Katz,* 369 U.S. 736, 747 (1962), the Supreme Court held that the parties must refrain not only from behavior "which reflects a cast of mind against reaching agreement," but from behavior "which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion."

In sum, as the court of appeals stated in *N.L.R.B.* v. *General Electric Company,* 418 F. 2d 736, 762 (C.A. 2, 1969), *cert. denied* 397 U.S. 965, *enfg.* 150 NLRB 192 (1964):

> [T]he statute clearly contemplates that to the end of encouraging productive bargaining, the parties must make "a serious at-

> tempt to resolve differences and reach a common ground." *N.L.R.B.* v. *Insurance Agents' Int'l Union,* 361 U.S. 477, 486, 487, 488 (1960), an effort inconsistent with a "predetermined resolve not to budge from an initial position." *N.L.R.B.* v. *Truitt Mfg. Co.,* 351 U.S. 149, 154-155 (1956) (Frankfurther, J., concurring).

The parties to collective bargaining are "required to do something more than attend purely formal meetings constituting no more than a mere pretense at negotiations." *N.L.R.B.* v. *Pine Nursing Home, Inc.,* 99 LRRM 2156, 2157 (C.A. 5, August 18, 1978). "The mere willingness of one party to enter into a contract of his own composition... does not satisfy the good faith bargaining requirement." *Wal-Lite Division of the United States Gypsum Co.,* 200 NLRB 1098, 1101 (1972). Moreover, while there is no requirement that any party agree to specific contract proposals, the Board may consider the "reasonableness of positions taken by an employer in the course of bargaining in negotiations." *N.L.R.B.* v. *Reed & Prince Mfg. Co.,* 205 F.2d 131, 134 (C.A. 1, 1953), *cert. denied,* 346 U.S. 887. Thus, the Board must determine whether a party showed a willingness to "approach the bargaining table with an open mind and a purpose to reach an agreement consistent with the respective rights of the parties." *Majure Transport Co.* v. *N.L.R.B.,* 198 F. 2d 735, 739 (C.A. 5, 1952).

Applying these principles to the instant case, I find that, after May 17, 1979, Respondent failed to bargain in good faith and instead bargained with a determination not to reach an agreement and to undermine and destroy the Union as bargaining representative.

1. The pre-Section 10(b) allegations

The General Counsel argues vigorously that Respondent exhibited a desire not to bargain in good faith by implementing certain benefits on January 1, 1979 and wage increases on April 1, 1979 after forcing the Union's agreement thereto by presenting the Union with a "Hobson's choice." Although these incidents occurred more than 6 months before the filing of the charge in this case, they may be utilized to shed light on bargaining positions and events occurring within the 6-month limitation period set forth in Section 10(b) of the Act. See *Crystal Springs Shirt Co.*, 229 NLRB 4, 7 (1977).

In support of this argument, General Counsel relies primarily on the Board's decision in *J.P. Stevens & Co.*, 239 NLRB No. 95 (1978). In that case the Board rejected the "Hobson's choice" theory of violation as "artificial," although it found that the employer did not bargain with an open mind on certain matters it presented to the union in that case. As the Board stated in *J.P. Stevens,* when an employer suggests the implementation of improvements in benefits to a union in negotiations, the question is whether the employer makes his presentation with a "mind impervious to change." (Slip op. p. 27).

In the circumstances of this case, I find that Respondent did not present the Union with improvements in insurance, dental and funeral leave on December 5, 1978 and an 8 percent wage increase on March 29, 1979 with a closed mind. In the case of the dental plan and the wage increase, Respondent was open to suggestions by the Union for improvements and indeed agreed in both instances that the Union could seek greater and different benefits in future negotiations. The Union never sought other improvements. Indeed, there is no evidence at all

concerning the insurance and funeral leave benefits. The credited testimony shows that the Union agreed to the implementation of benefits with the conditions mentioned above. There is no reason to believe that, had the Union objected to the implementation of benefits or sought specific changes, Respondent would not have considered the Union's positions. In this respect, it was the General Counsel's burden to show that such was the case and he has failed to show a closed mind in the offers of December 5, 1978 and March 29, 1979.

More specifically, as to the dental plan, it is true that Respondent had decided on contours of a corporate-wide dental plan some time before it was presented to the Union on December 5, 1978. There is nothing inherently wrong in this, however. Negotiations had just begun; there had only been four prior bargaining sessions. The parties had agreed to discuss non-economic issues first. Respondent was preparing to implement its corporate-wide changes on January 1, 1979 and sought the Union's agreement to implement those changes in New York. Nothing in the timing or the circumstances of Respondent's presentation of the improvements on December 5, 1978 suggests that it was not open to bargaining further about their content or their implementation.

The wage increase presented on March 29, 1979 is not significantly different. It is clear that the employees expected a wage increase of some amount on April 1, 1979 as this had been the annual increase date for New York employees for some 10 years. The parties discussed the matter on March 20 and the Union agreed to the 8 percent increase on March 29. Although the time between the presentation of the specific amount of increase and its proposed implementation was short, there is no evidence that Respondent was closed minded about further increases or

the implementation itself. There is no credible testimony from which it could be inferred that the amount itself was to be put into effect without regard to the Union's position. And the Union in fact agreed to implementation of the wage increase. In these circumstances, I cannot find that Respondent was not proceeding in good faith when it offered to implement the 8 percent wage increase.

The General Counsel's reliance upon *National Press, Inc.*, 246 NLRB No. 168 (1979) and *Servis Equipment Co.*, 198 NLRB 266, 268-269 (1972) is misplaced. Those cases are distinguishable. In *National Press*, the employer sent a letter to employees and, simultaneously, a telegram to the union offering to put into effect a specific wage increase unless an objection was received within a stated time. The parties had not had a negotiating session in several months. The Board held that there was "no suggestion that the Union would be given a chance to make a counterproposal" and its letter to employees stated that "the decision to give a wage increase, including the amount, had been made." No such intransigence was displayed here. In *Servis*, presented with circumstances similar to those in *National Press*, the Board found inadequate notice by the employer from which there could be no inference of acquiescence by the union. Here there is specific evidence of acquiescence and the parties agreed that the Union could bargain further on the dental plan and the wage increases.

2. The bargaining after May 17, 1979

It is well settled that an employer violates its duty to bargain if, during negotiations, he unilaterally institutes changes in existing terms and conditions of employment. *N.L.R.B.* v. *Benne Katz, etc.*, 639 U.S. 736 (1962).

However, "after bargaining to an impasse, that is, after good faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his pre-impasse proposals." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

Respondent defends its admitted unilateral change in overtime and meals policies, which was announced on May 31, 1979, on the ground that an impasse in negotiations existed after the May 17, 1979 bargaining session. I disagree. As the Board has stated

> A genuine impasse in negotiations exists when, despite the parties' best efforts to achieve an agreement, neither party is willing to move from its position. Until the collective bargaining process has been exhausted, no impasse can occur.

Excavation-Construction, Inc., 248 NLRB No. 81 (slip op. 6), 104 LRRM 1088, 1090 (March 26, 1980). In the instant case, I find that the collective-bargaining process had not been exhausted when Respondent instituted its changes in working conditions.

While it is true that the parties had met 37 times as of May 17, 1979, neither party had made a wage offer, and few, if any, economic proposals had been made and discussed to resolution. When the Union grudgingly approved implementation of the annual April wage increase, Trosclair specifically stated that this would not detract from a possible greater increase and retroactivity in future negotiations. Trosclair's remarks had been made just 6 weeks before and he remained away from negotiations from March 29 until April 27. As of May 17 there had been no serious discussion of union security or dues checkoff, which the Respondent knew were very impor-

tant to the Union, and little, if any, discussion on the no-strike no-lockout clause proposed by the Respondent. The Union had not even yet reduced its union security demands to a maintenance of membership clause, a possibility which was discussed in a September phone conversation between Trosclair and Coughlin. While Respondent clearly indicated that its pending proposal was its final offer, such intransigence by one party does not indicate an impasse. Connolly, the chief union negotiator, made it quite clear, as White admitted, that the Union would consider the Respondent's so-called final proposal at the end of the May 17 meeting. Indeed, when the parties next met, on July 10, Respondent presented the Union with a proposal with a covering letter stating that economic proposals would be made in the future.

It appears that when negotiations broke off on May 17, there were about 26 open items. Many of them had not even been seriously discussed. After a hiatus, the parties did resume bargaining. They met on eight additional occasions and headquarters officials of both Respondent and the Union met once in Washington. There was some movement, particularly by the Union, and many issues were resolved. The negotiations had been suspended for less than 2 weeks before Respondent made unilateral changes in working conditions. Particularly since the Respondent had insisted that no further meetings would be held until or unless the Union agreed to sign its final offer, such a short hiatus does not, of itself, establish that an impasse exists. See *N.L.R.B.* v. *Acme Works, Inc.*, 582 F. 2d 153, 157 (C.A. 2, 1978). Nor does the fact that the Union sought to obtain the views of its members concerning a possible strike indicate impasse for even an actual strike does not indicate impasse. See *N.L.R.B.* v. *J.H. Bonck Co.*, 424 F. 2d 634, 638 (C.A. 5, 1970). Here the

Union did not even strike. Finally, the federal mediator had just entered negotiations at the beginning of May 1979. Although Respondent argues that the mediator entered negotiations on April 30, it is more likely that he did so on May 8, after a hiatus caused by Trosclair's need to review the progress of negotiations. In any event, only three bargaining sessions were held between April 30 and May 17. It would be incongruous to find an impasse based on such a short period of time after the intervention of a mediator. In these circumstances I find that no impasse existed on May 17, 1979, when Respondent made its "final offer."

It is also settled law that an impasse may not be urged as a defense to a unilateral change in working conditions if it has been caused by the failure of one of the parties to bargain in good faith. *Industrial Union of Marine and Shipbuilding Workers of America* v. *N.L.R.B.*, 320 F. 2d 615, 621 (C.A. 3, 1963). In the instant case, it is clear, and I find, that any alleged impasse was caused by Respondent's failure to bargain in good faith after May 17, 1979 and thus cannot constitute a lawful impasse.

The Respondent's intransigence in characterizing its May 17 bargaining position as a "final offer," coupled with its direct contacts with employees in an attempt to sell implementation of the overtime proposal is evidence that it was not at this point bargaining in good faith. For example, in early May, prior to the negotiating session of May 8, Respondent advertised implementation of recent wage and benefit changes, stating that the Union did not object to their implementation. It listed improved overtime as one of these benefit changes, when, in fact, the Union had objected to its implementation and indeed had its own proposal on overtime on the bargaining table. In-

deed, on April 24, Respondent brought to the attention of its employees that it was interested in implementing overtime changes in New York even though negotiations were in progress on this very issue. After the May 17 negotiating session, Respondent did not wait for the Union's response to its offer to implement changes in overtime. On May 24 and 25, only one week after the last negotiating session, Respondent sought to drum up support for the changes and Respondent's position on the contract by memoranda issued directly to employees. Such conduct not only tends to undermine the Union's position as bargaining agent, but also shows Respondent's intransigent state of mind at a time when there were numerous open issues, including several important ones which had not even been seriously discussed, between the parties. In this manner, the Respondent emphasized that benefits would flow only from it, not the Union or the collective-bargaining process, and the emphasis by Respondent that its May 17 offer was final, notwithstanding the Union's position in bargaining, made it clear to employees that collective bargaining through the Union would be futile. The combination of a "take it or leave it" approach at the bargaining table with a campaign of direct-dealing with employees to sell an employer's package of employee benefits is the antithesis of good-faith bargaining. See, *Texas Electric Corp., Inc.*, 197 NLRB 10, 14 (1972); *General Electric Co.*, 150 NLRB 192, 194-195, *enf'd* 418 F.2d 736 (C.A. 2, 1969), *cert. den.*, 397 U.S. 965.

In view of my finding that there was no lawful impasse after May 17, 1979, both as a factual matter and because the alleged impasse was accomplished in the context of a failure to bargain in good faith, I also find that Respondent's unilateral change of overtime and meal policies on May 31, 1979, violated Section 8(a)(5) and (1) of the Act.

After July 10, 1979, the parties met on several occasions, but the record shows that Respondent moved little, if at all, from its final offer of May 17, 1979. Most of the movement of the parties took place as a result of the Union's agreement to Respondent's open proposals. White's testimony is quite clear that, at least from Respondent's point of view, the May 17 offer remained the Respondent's final offer. Also supportive of this view is Lammers' testimony, as well as Respondent's speech to employees in early October concerning the decertification effort. In that speech, the Respondent told employees that it had made its final offer on May 17, 1979. Thus, although I find that there were some changes from Respondent's May 17 position, the changes were not substantial ones and its continued intransigence caused the Union to capitulate on almost all of Respondent's open positions by the last negotiating session on October 9, 1979. Such intransigence, in light of the failure to bargain in good faith after May 17, 1979 and the unlawful unilateral improvements in working conditions implemented on May 31, 1979, constitutes additional evidence of Respondent's overall failure to bargain in good faith.

3. The Union security and dues checkoff issues

The General Counsel alleges that Respondent's failure to bargain in good faith was also demonstrated by evidence of its bargaining tactics in rejecting the Union's union security and dues checkoff proposals. I agree, at least insofar as Respondent's conduct is considered in the context of other evidence of Respondent's failure to bargain in good faith after May 17, 1979.

The evidences shows that Respondent resisted all attempts by the Union to secure a dues checkoff and union security clause. The parties discussed the technical aspects

of checking off union dues and no cost or business reasons were advanced for not checking off such payments which must, of course, be authorized as a voluntary matter by each employee. The Union, in July, scaled down its union proposal to embody a simple maintenance of membership clause with a one-year escape provision. Respondent knew that the Union considered both issues important ones which the Union urged notwithstanding Respondent's position that its May 17, 1979 offer was its "final offer." Respondent's consistent reaction to the Union's proposals was adamantly negative, despite the fact that, as the Union pointed out, Marriott had agreed to checkoff and union security arrangements at some of its other locations. Respondent offered no counterproposals on these issues and suggested no trade-offs. The only reason offered by Respondent's negotiators for rejecting the Union's proposals was Respondent's view that it did not believe that the Union had majority support or sufficient strength to justify the proposals.

Although it is clear that an employer is not required to agree to any particular contract proposal, it is "not immune from condemnation for bad faith merely because it defines its immediate bargaining tactic as the refusal to agree on one issue." *United Steelworkers of America, AFL-CIO* v. *N.L.R.B., (Roanoke Iron & Bridge Works, Inc.)*, 390 F. 2d 846, 850 (C.A.D.C., 1967), *cert. den.*, 391 U.S. 904. Thus, the Board has held that an employer violates the Act when he resists union security and dues checkoff proposals for euphemistically stated "philosophical reasons" which, in practical effect, demonstrate a closed mind, an intent to frustrate the reaching of any agreement, or a desire to destroy or even cripple the Union as bargaining agent. See, *Preterm, Inc.*, 240 NLRB No. 81 (1978) (union security); *Roanoke Iron & Bridge Works, Inc.*, 160 NLRB 175, 180-181 (1966)

enforced sub nom. United Steelworkers of America, AFL-CIO v. *N.L.R.B.*, 390 F. 2d 846, 850-852 (C.A.D.C., 1967) (dues checkoff).

In the circumstances of this case, particularly in the context of other evidence of Respondent's refusal to bargain in good faith after May 17, 1979, I find Respondent's close-minded rejection of the Union's union security and dues checkoff clauses constitutes further evidence of its failure to bargain in good faith. As I have indicated, Respondent offered no counterproposals and suggested no trade-offs. It rejected the Union's proposals because, as its negotiators stated at the bargaining table and in the hearing of this case, Respondent believed the Union did not have majority status or sufficient strength. These reasons demonstrate Respondent's lack of good faith in bargaining with the Union.

At the time Respondent claimed the Union's lack of majority, at least as early as July, 1979, the Union was entitled to a presumption of majority by virtue of the Board certification. Indeed as early as April, 1979, White resisted the Union's proposals, which he admittedly treated as essentially one proposal, by referring to the Union's close election victory. An employer who approaches negotiations with an eye towards questioning a certified union's representative status is surely not bargaining in good faith. Further, I find that the evidence, if any, of the Union's loss of majority in April of 1979 was negligible and nebulous – a matter of wishful thinking on the part of Respondent's management and negotiators. The issue was litigated in connection with the Respondent's withdrawal of recognition and its October decertification meetings and the evidence revealed that only a handful of named employees asked officials of Respondent how they could get rid of the Union. There was also vague evidence of

others who were dissatisfied but obviously such dissatisfaction may have arisen from Respondent's unlawful resistance to good-faith bargaining. Accordingly, the Respondent's reliance on an alleged loss of majority – unproven and without basis – during the certification year, to resist union security and union dues proposals was contrary to good-faith bargaining.

The other statement made by Respondent's negotiators – that the Union did not have sufficient strength to justify Respondent to agree to the Union's proposals is cryptic but susceptible to two interpretations. The first is that the Union lacked sufficient support from the employees to force Respondent to agree to the Union's proposals. While perhaps less objectionable as evidence of Respondent's cast of mind against reaching agreement than specifically questioning the Union's majority during the certification year, in the circumstances of this case, it really amounts to the same thing. The statement was made in the context of specific statements that Respondent believed the Union lacked majority status and that it was resisting the Union's proposals because of the close election. The second interpretation is that Respondent was justifiably concerned that certain employees who did not support the Union would be forced to either join or pay dues and that Respondent felt obligated to protect these employees. While this interpretation might well be a permissible reason in some circumstances to resist a union security proposal, I do not believe the Respondent in this case based its resistance to the Union's proposals on a desire to protect non-union employees. Even though Respondent was represented in negotiations by an experienced labor lawyer, it did not make such a statement as a reason to oppose the Union's proposals. Moreover, legitimate concerns for non-union employees would have

been accommodated when the Union reduced its proposals to a maintenance of membership clause. And such concerns would not provide a reason to adamantly reject a dues checkoff provision which is based on voluntary authorizations by employees. Yet Respondent never altered its adamant refusal to consider the Union's proposals.

Thus, I consider Respondent's negative and unyielding position in rejecting the Union's union security and dues checkoff proposals after May 17, 1979 to constitute evidence of its cast of mind against bargaining in good faith with the Union. In the context of the other evidence dealing with its failure to bargain in good faith after May 17, 1979, Respondent's conduct with respect to the Union's proposals evinced a desire not to reach agreement with the Union and a desire to destroy or to cripple the Union as bargaining representative of the employees.[13]

4. The circulation of decertification petitions and the withdrawal of recognition

Further evidence of Respondent's bad-faith bargaining is found in Respondent's organized effort to promote decertification of the Union. The evidence shows that Respondent made a decision to call meetings to tell employees how to go about decertifying the Union in the midst of the October negotiations. Meetings were actually held with Respondent's supervisors speaking on behalf of decertification at a time when a specific bargaining session was scheduled. This alone is inconsistent with good-faith

[13]In considering this issue I do not rely on the General Counsel's specific argument that, on August 27, 1979, the parties could have traded the Respondent's no-strike clause for the union's maintenance

bargaining. How can an employer be bargaining in good faith with a sincere intent to reach agreement when it calls meetings on work time to distribute material whose purpose is to support the decertification of the Union and to distribute actual petitions to accomplish this purpose?

In addition, the Respondent's role in the meetings was such as to clearly show employees that it was sponsoring the decertification effort. The work-time meetings of employees, the participation of Washington-based managers, the suggestion of the actual language of the petitions and the content of the accompanying booklets all made clear that Respondent expected and desired the employees to decertify the Union. The fact that Respondent did not even translate the highly technical language of the decertification booklet into Spanish, the dominant language of some 60 percent of its employees, although it did translate the conclusory language of the form petition itself, shows that it was quite willing for the employees to be misled or to rush to judgment on this issue. The Respondent's role itself is sufficient to establish an unlawful interference in Section 7 rights, particularly in view of the fact that it was supposedly bargaining with the Union at the same time it was seeking to end its representative status. Having destroyed the employees' right to bargain collectively Respondent was also seeking to

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of membership clause and that Respondent's failure to do so in accordance with the possibility that this be done as expressed in the September 1978 phone call between Coughlin and Trosclair was unlawful. I cannot consider the preliminary sparring of Trosclair and Coughlin at a time before bargaining actually began and make a finding that Respondent in effect agreed to give a union security clause in exchange for a no-strike clause. Moreover, the Board is not empowered to speculate on which clauses could have been exchanged during negotiations.

destroy the Union itself as bargaining agent. Furthermore, the remarks of at least one of Respondent's agents in the decertification meetings indicate quite clearly that coercion was suggested in Respondent's efforts to decertify the Union. Thus, Corrada questioned why employees supported the Union, told them the Union had accomplished nothing and "insisted that [the petition] had to be signed."

It is true that supervisors were not directly involved in the solicitation of the actual petitions and none were solicited on working time. However, a far more potent indicator of employer sponsorship was its organization of the meetings that immediately preceded the circulation of the petitions which Respondent somewhat unabashedly suggests in its brief was a "lighting (sic) decertification movement." The alleged basis for the decertification meetings was scant and ambiguous testimony by Respondent's officials that "some" employees asked how they could rid themselves of the Union. Actually, when Respondent's supervisors were asked on the witness stand to name names they could only identify six or seven employees who asked how they could get rid of the Union. The unit numbered about 750 employees. Alleged dissatisfaction with the Union was present, according to Respondent's witnesses, since April of 1979, and questions about how employees could get rid of the Union were met by statements that the employees could contact the Labor Board. After the Respondent presented its "Final offer" of May 17 and after the expiration of the certification year, the Respondent decided to aggressively and affirmatively sell decertification to its employees. I find that Respondent planted the idea of decertification in the minds of employees, gave them the specific language and forms to effectuate decertification, and, most importantly, led employees, especially the Spanish speaking employees, to

believe that the Respondent was behind and sponsoring the decertification effort. Such conduct had the foreseeable effect of obstructing the bargaining process and thus was violative of Section 8(a)(5) and (1) of the Act. See *Rogers Mfg. Co.*, 228 NLRB 882, 887 (1977); *Martinsburg Concrete Products*, 248 NLRB No. 172, n. 3 (1980).

Finally, part and parcel of Respondent's final effort to destroy the Union was its intransigence on October 9, when, despite Respondent's bad-faith bargaining for 5 months, agreement was still possible if Respondent came to grips with the duration-wage increase issue. The Union — having capitulated on almost all the crucial issues — asked Respondent to write its own ticket on the April 1980 wage increase. Respondent refused to do so and instead went ahead with its decertification effort. In a duplicitous move, Respondent set up another bargaining session, knowing full well, that it was going ahead with decertification meetings. On October 9, while a bargaining session was in progress, Vice-President Lammers was instructing his supervisors on the conduct of decertification meetings. This conduct illustrates Respondent's lack of desire to reach agreement.

Contrary to Respondent's contention, it did more than give its employees requested advice concerning decertification. As I have indicated, without any more than scant evidence of dissatisfaction with the progress of bargaining or residual opposition to the Union, Respondent cleverly utilized the notion that "some" employees had asked how to rid themselves of the Union, and, at a time, when it, unilaterally, determined that bargaining had gone on long enough, Respondent set up work-time meetings in order to sell decertifiction to the employees. Respondent sug-

gested specific language in form petitions which were actually utilized in filing the decertification petition. Employee Withrow, the person who filed the decertification petition, testified that he began his efforts after the Respondent's meetings at which he learned that the time was ripe for a decertification effort. At the meetings, Spanish speaking employees were not given Spanish texts of the decertification booklets. This fact plus ambiguously coercive remarks by at least one Spanish speaking supervisor, Corrada, make it abundantly clear that Respondent was behind the decertification effort and that it sought to give the impression that employees were required to participate in the effort. Respondent also made clear that collective bargaining was over because it would not budge from its final offer of May 17 even though another bargaining session was scheduled. In these circumstances, Respondent's conduct goes far beyond a simple response to requested information. See *Texas Electric Corp., Inc.*, 197 NLRB 10, n. 1 and 14-15 (1972); *Craftool Mfg. Co.*, 229 NLRB 634 (1977).

It is well settled that, during the first year following certification, a union's representative status will be irrebuttably presumed to continue, absent special circumstances beyond mere proof of loss of majority, and a refusal to bargain would be violative of the Act. *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 98-104 (1954). Upon expiration of the certification year an employer may lawfully withdraw recognition by rebutting the presumption of the union's continuing majority or by demonstrating that the withdrawal was based on a reasonably grounded good-faith doubt of the union's majority support. See *Celanese Corp.*, 95 NLRB 664, 672 (1951). It is equally well settled that an employer may not avoid his duty to bargain by relying upon loss of majority status attributable to his own

unfair labor practices. See *Medo Photo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687 (1944).

In view of the Respondent's failure to bargain in good faith after May 17, 1979, I find that Respondent's withdrawal of recognition – first stated by White in a telephone conversation with union officials on October 12, 1979 – was unlawful and violative of Section 8(a)(5) of the Act. Respondent's asserted good-faith doubt of the Union's majority was rendered null and void by virtue of its unlawful bargaining and its responsibility for causing the circulation of the decertification petitions. Moreover, the testimony of Respondent's officials shows that they could only identify a handful of employees who indicated a desire to get rid of the Union – far short of a majority – prior to Respondent's decertification effort. There was thus no rational basis for Respondent's withdrawal of recognition.[14]

5. Other issues

The General Counsel also argues that Respondent's negotiators Trosclair and White had no authority to engage in meaningful bargaining with the Union and that this was also evidence of Respondent's failure to bargain in good faith. I disagree. The General Counsel relies particularly on Trosclair's statement on March 29, 1979 that he personally advised his superiors not to implement the 8 percent annual wage increase. While the evidence on this issue shows that Trosclair left the negotiating session, ostensibly to talk to his superiors, it is clear that he was opposed to offering or implementing the increase primarily as a bargaining tactic. Such disagreements between a

[14]Respondent's contentions that the Union's failure to call a strike and its ultimate capitulation to Respondent's bargaining positions justified a withdrawal of recognition are wholly without merit.

negotiator and his principal do not, in and of themselves, establish a lack of authority on the part of the negotiator to conclude an agreement. The other arguments set forth on this point by General Counsel – that the lack of communication between negotiators and principals prevented the Union from quickly ascertaining the employer's actual positions and demonstrated the employer's intent not to reach agreement and to delay the negotiations – are not specific enough for me to make a finding that Trosclair and White lacked authority to negotiate an agreement or that such lack of authority was a hinderance to good-faith bargaining. This is not to say that the conduct of the negotiators did not contribute to the findings I make concerning Respondent's failure to bargain in good faith. However, I am unable to conclude that Respondent's failure to bargain in good faith was caused by any lack of authority on the part of the negotiators or that any such lack of authority formed an independent basis for finding a failure to bargain in good faith. On this record, Respondent's negotiators reflected the position of the Respondent's management and their conduct forms the basis of my findings under the assumption that they had the authority to reach agreement if their principals so desired. The fact of the matter is that they, like their principals, did not wish to reach agreement after May 17, 1979, except on their own terms.

The Union, but not the General Counsel, also argues, in support of paragraph 13 of the Complaint, that Respondent failed to meet on certain dates in April and October of 1979 and failed to set bargaining sessions in June and July of 1979. Insofar as that paragraph alleges specific refusal to meet on certain dates, I do not find that it is sustained. Respondent met on most of the dates specified, did not refuse to meet, except for the October 15 meeting

which was cancelled because of the filing of the decertification petition, and did not meet in June because of its unlawful refusal to bargain on and after May 17, 1979. I have considered Respondent's conduct on these specific dates and have made findings on its overall bargaining conduct. I see no reason to make any specific findings on Respondent's motives in refusing or failing to meet or to bargain fully on specific dates. I shall therefore dismiss the allegations in paragraph 13 of the Complaint.

Conclusions of Law

1. Since September 27, 1978 and at all times thereafter the Union was, and is presently, the lawful and exclusive bargaining representative for purposes of collective bargaining for the unit of Respondent's employees covered in the Board certification of September 27, 1978.

2. By failing to bargain in good faith with the Union after May 17, 1979, by making unilateral changes in terms and conditions of employment on May 31, 1979, by originating, instigating, encouraging, assisting and sponsoring the circulation of decertification petitions by employees, and by withdrawing recognition of the Union, Respondent has violated Section 8(a)(5) and (1) of the Act.

3. The violations mentioned are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not otherwise violated the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and to take affirm-

ative action necesary to effectuate the policies of the Act.

In addition to the customary bargaining order, I shall recommend that Respondent reimburse the Union for all expenses incurred by it in attempting to negotiate a bargaining agreement after May 17, 1979 when Respondent demonstrated its unlawful bargaining posture until the issuance of the Complaint in this case, January 4, 1980. Such expenses were incurred under the condition that Respondent bargain in good faith. Since Respondent defaulted on this statutory requirement, the Union expenses on behalf of the employees had no opportunity for recoupment due to Respondent's unlawful conduct. Reimbursement of these expenses is thus simply a restoration of the *status quo ante*. The Respondent will be ordered to reimburse the Union for reasonable salaries, travel costs, per diem and other reasonable bargaining expenses incurred from May 17, 1979 until January 4, 1980. See *J.P. Stevens & Co., Inc.*, 239 NLRB No 95 (slip op. p. 84).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[15]

ORDER

Respondent, Marriott In-Flite Services, A Division of Marriott Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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[15]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Bargaining in bad faith for a collective-bargaining agreement and about other mandatory subjects of bargaining with the Union as the exclusive bargaining representive in the following appropriate bargaining unit:

> All employees of Respondent employed at its Commissary, Kitchens and Terminal Facilities, including shops 344, 370, 371, 374, 375, 376, 377 and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.[16]

(b) Unilaterally taking action with respect to wages, hours, and other terms and conditions of employment without affording the Union a reasonable opportunity to bargain thereon.

(c) Originating, instigating, encouraging, assisting or sponsoring any efforts by employees to decertify the Union as their exclusive bargaining representative in order to avoid its obligation to recognize and bargain with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights as set forth in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

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[16]For the purpose of determining the effective period of the certification herein, the initial year of certification shall be deemed to begin on the date Respondent commences to bargain in good faith with the union.

(a) Upon request, bargain collectively and in good faith with the Union as the exclusive representative of the employees in the above-described unit with respect to wages, hours and other terms and conditions of employment, and, upon request, embody in a signed agreement any final understanding reached by the parties.

(b) Consult with the Union and afford it an opportunity to bargain collectively with respect to any changes in wages, hours, and other terms and conditions of employment before implementing such changes.

(c) Post at its facilities at John F. Kennedy and LaGuardia Airports, New York, New York, copies of the attached notice marked "Appendix."[17] Copies of said notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Pay to the Union the reasonable costs of participating in collective bargaining negotiations, as set forth in "The Remedy" section of this Decision.

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[17] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Notify the Regional Director for Region 29, in writing, within 20 days of the receipt of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that paragraph 13 of the Complaint be dismissed.

Dated, Washington, D.C. September 17, 1980.

/s/ Robert A. Giannasi
Administrative Law Judge

FORM NLRB-4727 JD-549-80

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENGY OF THE UNITED STATES GOVERNMENT

WE WILL NOT bargain in bad faith for a collective-bargaining agreement and about other mandatory subjects of bargaining with the Union as the exclusive bargaining representative in the following appropriate bargaining unit:

> All employees of Respondent, employed at its Commissary, Kitchens and Terminal Facilities, including Shops 344, 370, 371, 374, 375, 376, 377, and 686, servicing airlines operating at John F. Kennedy International Airport and LaGuardia Airport in the Borough of Queens, New York City, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally take action with respect to wages, hours, and other terms and conditions of employment without affording the Union a reasonable opportunity to bargain thereon.

WE WILL NOT originate, instigate, encourage, assist or sponsor any efforts by employees to decertify the Union as their exclusive bargaining representative in order to avoid its obligation to recognize and bargain with the Union.

WE WILL NOT in any like or related manner interfere

with, restrain, or coerce employees in the exercise of their rights as set forth in Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with the Union as the exclusive representative of the employees in the above-described unit with respect to wages, hours and other terms and conditions of employment, and, upon request, embody in a signed agreement any final understanding reached by the parties.

WE WILL consult with the Union and afford it an opportunity to bargain collectively with respect to any changes in wages, hours, and other terms and conditions of employment before implementing such changes.

WE WILL pay to the Union the reasonable costs of participating in collective bargaining negotiations from May 17, 1979 until January 4, 1980.

MARRIOTT IN-FLITE SERVICES, A DIVISION OF MARRIOTT CORPORATION

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street – 4th Floor, Brooklyn, New York 11241 (Tel. No. (212) 330-7709)

APPENDIX F

NOTICE TO EMPLOYEES
DECERTIFICATION ELECTION

"FED UP?"

If you are dissatisfied with your Union Representation, the National Labor Relations Act contains a provision whereby employees or someone acting on their behalf can file a petition seeking an election to determine if the employees wish to retain the individual or labor organization currently acting as their bargaining representative, whether the representative has been certified or voluntarily recognized by the employer. This is called a decertification election.

The following series of questions and answers will help you understand your legal opportunities and how to do something about them.

Read them and you will have a better understanding of how your Federal Government stands ready to help you.

Q. 1. If I am presently represented by a union must I belong to the union as long as I am employed by the Company?

A. No. The same Federal law that protects your right to *join* a union provides a way for *you and your co-workers* to disassociate yourselves from the union.

Q. 2. Can I personally quit the union without involving my fellow employees?

A. Yes, you can personally quit the union. However, the union would still continue as your represent-

ative and could sign a contract or call a strike on your behalf. Also, under certain conditions the union could, by a contract provision, require you to contribute money to it in order to continue your employment with your employer.

Q. 3 Is there any way that I can remove the union as my authorized representative?

A. Yes, this can be done through a "decertification" election. This type of election is designed to eliminate the union completely as the representative of all the employees in the unit. This procedure provides you with full relief by taking away the union's authority to act as your bargaining representative. Obviously, if the union is not your legal bargaining representative, you cannot be required to join the union, or pay dues and the union cannot act on your behalf.

Q. 4 You refer to an election in the example above. How do I go about getting an election?

A. You eventually must go to the National Labor Relations Board, an agency of the Federal Government, which is in charge of conducting "decertification" elections. Before the NLRB will conduct the federally supervised decertification election, however, the government agent assigned to the New York region must be convinced that there is sufficient interest among you and your coworkers to have the NLRB conduct the decertification election.

Q. 5. How can we prove that we are serious in wanting another election?

A. You and your fellow employees who feel the same way must get signatures from at least 30% (about 1/3) of the employees in the unit on a petition stating that they no longer want to be represented by the I.A.M.

Q. 6. How should the petition to "decertify" be worded?

A. Simply take lined sheets of 8½" x 11" paper and type or print the pages as per the attached sample.

Q. 7. How will we know when we have 30% of the people in our unit?

A. First, you must find out who is included in the bargaining unit. Ask your manager if you do not already know. He can tell you this fact. You and your co-workers can compile a list of the names of the employees in the unit. Then you can start to obtain the required signatures on the petition. The voting unit will be the same unit that voted in the election of January 19, 1978. Any employees currently employed in a position that voted in the prior election may vote in the decertification election.

Q. 8. Do we need a majority of votes cast in a "decertification" election to terminate the union representation?

A. Yes. If over 30% of the employees sign the petitions, an election can be held. However, in order to be sure that you win the election, it is recommended that you get the signature of at least 60% of the eligible employees. The 30% mentioned above represents the minimum number of signatures that the government requires in order to get involved in your case. The greater the

number of signatures obtained on the petitions, the greater the possibility of getting the majority of the votes cast in an election and successfully removing or "decertifying" the union.

Q. 9. Can I start at once to get signatures and get the National Labor Relations Board to act?

A. Yes, you may proceed at any time to get signatures on a petition. However, do not get them during your working time in a working area. Get signatures during your rest periods, lunch hours or before or after your regular working hours. Do not bother your friends while they are working, even though you, yourself, are on your lunch hour or on your own time. If you were to obtain signatures during your working time or that of your co-workers, the NLRB may consider that the company was interfering in your freedom of choice and could nullify your efforts.

Q. 10. Are there time limits to when we can ask the Government for a "decertification" election?

A. Yes. If a contract is signed between the Company and the union, the NLRB has ruled that everyone under the contract must live with it for the length of the contract. Therefore the best time to seek a "decertification" election is before any contract for New York In-Flite and Terminal employees is approved.

Q. 11. When do we tell the Company about our intent to "decertify"?

A. You should tell the Company at the same time that you go to the NLRB. In that way, you will alert the

Company that it is under no obligation to bargain or meet any further with the I.A.M. while the decertification procedures are taking place.

Q. 12. How do I locate the nearest NLRB office assigned to handle the New York area?

A. You can find the location of the office by referring to the telephone book under the listing for *United States Government*. Look up the office long before you are ready to go in with your petition with the signatures. If you mail the petition, be sure to keep several photocopies of the petition just in case the original gets lost somewhere along the way. Even if you hand-deliver the petition, it is wise to keep several photocopies. As a minimum, always keep one file copy.

Q. 13. What will the union do to me and my fellow workers when they hear about our intent to get out of the union?

A. They won't like it one bit, but they can't do anything to stop you. They will probably try to persuade you to change your mind. They may even threaten you, try to coerce you and make life miserable for you. Such behavior on the part of the union is illegal and constitutes an unfair labor practice. If the I.A.M. tries to coerce you in any way into not filing for decertification, you should immediately report this to the National Labor Relations Board. The Board has the authority to prohibit such action on the part of unions and to insure that your right to proceed to the election will be protected. The NLRB has held, and the Courts agree, that a union may not fine a member

for seeking to have the union decertified as bargaining representative. The Board has held that under these circumstances, a fine is illegal coercion of *your right* to be represented or *not represented* by a union. An election is the long-standing, American way to find out what the majority of people want or prefer, and the federal government will see that the election is conducted fairly.

Q. 14. Can I get help from my employer in this whole process of "decertification"?

A. Unfortunately, very little. The federal labor law takes the position that the company may try to scare you or threaten you or coerce you in some subtle way, either to stay in the union or to get out of the union. The intent of the law is to "protect" You from both the company *and* the union. You must act on your own and with your associates, but remember, the Federal Labor Law stands behind you. You are protected in this kind of activity by the power of the Federal Government and the courts.

Q. 15 It isn't as easy to get out of a union as it was to get into it. Is it worth the effort?

A. The decision is up to you. This booklet was written to explain to anyone interested how the federal law protects the freedom of the individual and stands ready to support the opinion of the majority of employees in an appropriate unit. More and more individuals are concluding that unions have lost touch with the people whom they are supposed to represent. Many employees represented by

unions have become fed up with the cost of union representation to the employee plus the possibility of strikes called by the union and feel that unions are no longer needed. In 1977 there were 1867 "decertification" petitions filed with the NLRB vs. 624 petitions 10 years earlier in 1967. Of the petitions filed in 1977 which resulted in elections, unions were ousted as the bargaining agents 76% of the time.

We, the undersigned, employees of the Marriott In-Flite and Terminal shoppes serving JFK and LGA, presently represented by the International Association of Machinists and Local 1894, wish to have the National Labor Relations Board conduct an election since we believe a majority of employees in our unit no longer want to be represented by the above union.

NAME DATE

Nosotros, los infrascritos, de las Cocinas de In-Flite y Restaurantes de Terminales de Marriott sirviendo a los aeropuertos de Kennedy y La Guardia, que en el presente estamos representados por el Local 1894 de la union de los Maquinistas (Local 1894 of the Machinist Union), queremos tener una elección conducida por la Junta Nacional de Relaciones Laborales (National Labor Relations Board) porque creemos que la mayoría de los empleados en esta unidad no quieren ser representado por la antes mencionada union.

NOMBRE FECHA

APPENDIX G

1st Strike Notice

IAMAW Air Transport Lodge 1894
JOHN F. KENNEDY INTERNATIONAL AIRPORT

On May the 17th, Marriott notified your Union that they had given us their final offer, which was in our opinion nothing more than what you presently have.

Your Union has rejected this so called offer because it is not only a slap in the face directed toward you but embarrassing for us to bring back to you to vote on.

Because of the companys total disregard for your well being, we are calling for a meeting for Tuesday, June 19th, 1979.

The purpose of this meeting is to establish a date for a STRIKE. It is important that you attend and voice your opinion.

Time: 10:00 am until 7:00 pm

A LOS EMPLEADOS DE MARRIOTT.

El 17 de Mayo Marriott nos informo que no tenian nada mas que presentar en negociaciones y que lo presentado era la oferta final, en nuestra opinion en esta oferta no habia nada nuevo o que ustedes ya no tengan.

Su Union ha rechasado la tal oferta no solamente por un insulto contra ustedes si no tambien por que seria una verguenza para nosotros presentar ante ustedes para votacion un contrato de tal indole. Algunos de ustedes pueden

pensar que Marriott ha jugado al gato y al raton pero esto no es verdad el que rie de ultimo rie mejor.
FECHA: Martes Junio 19 de 1979.
HORA: 10:00 am hasta las 7:00 p.m.

Fraternally yours

/s/ Gene Coughlin
President Local 1894

ONE UNION FOR JOB SECURITY –
Post on Bulletin Board

APPENDIX H

2nd Strike Notice

IAMAW Air Transport Lodge 1894

BULLETIN

JOHN F. KENNEDY INTERNATIONAL AIRPORT

TO ALL THE MEMBERSHIP ON MARRIOTT

INFORMATION CONCERNING THE COMING STRIKE

Due to Marriott's refusal to improve their last offer in negotiations, the union is forced to exercise its rights under the laws of this country to strike. You will be notified of the exact day and time.

Listed below are the UNIONS PROPOSALS that to date have not been resolved:

1. WAGES
2. 30¢ deducted for your so-called meals
3. Union Security

Up until our last meeting with the company the union had many open issues. The company took the position that the union must move on those items before they would give us another proposal. In an attempt to resolve this contract the union did move on these issues. Twenty two were withdrawn and the above proposals were left open. The company then notified the union that their last offer was their final offer, even though the union had just withdrawn twenty two proposals. The company refused to discuss the remaining issues.

The union through the Federal Mediation and Conciliation Service representative, then flatly rejected Marriott's

"final offer". When the Union strikes Marriott, we will not return to work until we have come to an agreement on all open issues.

When the strike is over we will *all* return or none of us will return to work.

Remember the cost of living so far this year has gone up at an annual rate of more than 14%.

"Ask yourself" if this rate continues where does it leave me with my 8%

(SIX PERCENT DEEPER IN DEBT?)

ONE UNION FOR JOB SECURITY
Post on Bulletin Board

APPENDIX "I"

National Labor Relations Act, as amended:

Section 7, 29 U.S.C. § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 158(a)(3) of this title."

APPENDIX J

National Labor Relations Act, as amended:

Section 8(c), 29 U.S.C. § 158(c):

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed or graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(d), 29 U.S.C. § 158(d) [in pertinent part]:

"For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

...."

Office-Supreme Court, U.S.
FILED
AUG 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2126

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARRIOTT IN-FLITE SERVICES, ETC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by failing to bargain in good faith with the Union, by making unilateral changes in the employees' terms and conditions of employment, by originating and sponsoring circulation of decertification petitions, and by withdrawing recognition from the Union.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 2

Statement 2

Argument 4

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Brooks v. *NLRB*, 348 U.S. 96 9

Chevron Oil Co. v. *NLRB*, 442 F.2d 1067 10

Gulf States Manufacturers, Inc. v. *NLRB*, 579 F.2d 1298, adopted in relevant part en banc, 598 F.2d 896 10

Industrial Union of Marine & Shipbuilding Workers v. *NLRB*, 320 F.2d 615, cert. denied, 375 U.S. 984 6

M. R. & R. Trucking Co. v. *NLRB*, 434 F.2d 689 10

NLRB v. *American National Ins. Co.*, 343 U.S. 395 ..... 5, 8, 9, 10

NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272 9

NLRB v. *Insurance Agents' International Union*, 361 U.S. 477 9

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 8

Page

Cases—Continued:

NLRB v. *Movie Star, Inc.*, 361 F.2d 346 12

NLRB v. *S & H Grossinger's, Inc.*, 372 F.2d 26 11-12

New York Printing Pressmen & Offset Workers v. *NLRB*, 538 F.2d 496 6-7

Pease Co. v. *NLRB*, 666 F.2d 1044, cert. denied, 456 U.S. 974 10

Pittsburgh-Des Moines Corp. v. *NLRB*, 663 F.2d 956 10

H.K. Porter Co. v. *NLRB*, 397 U.S. 99 ..... 8, 9

Rogers Mfg. Co., 228 N.L.R.B. 882 12

Teamsters Local No. 357 v. *NLRB*, 365 U.S. 667 8

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 10

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

Section 7, 29 U.S.C. 157 4
Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 3, 5
Section 8(a)(5), 29 U.S.C. 158(a)(5) 2, 3, 5

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 3a-5a) is not reported. The decisions and orders of the National Labor Relations Board (Pet. App. 6a-91a) are reported at 263 N.L.R.B. No. 137, 259 N.L.R.B. 157, and 258 N.L.R.B. 755, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1983 (Pet. App. 3a-5a). A petition for rehearing was denied on May 2, 1983 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Certain provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. 105a-106a). Other relevant provisions include Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)), which states in pertinent part:

> Section 8(a). It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, * * *.

STATEMENT

1. The facts are set out in detail in the opinion of the Administrative Law Judge (ALJ) (Pet. App. 37a-64a). The case arises from actions taken by petitioner, Marriott In-Flite Services, during negotiations with the Union, International Association of Machinists and Aerospace Workers, from October 1978 to October 1979.

The Union was certified as the employees' exclusive bargaining representative on September 27, 1978. On October 20, petitioner and the Union began bargaining (Pet. App. 37a). The parties met repeatedly through May 17, 1979, after which petitioner declared that an impasse had been reached and unilaterally implemented certain changes in terms and conditions of employment (Pet. App. 50a-51a). The parties resumed meetings in July, and continued to meet until October 9, at which time petitioner initiated a decertification campaign among the employees (Pet. App. 57a-63a). On October 12, a decertification petition was filed with the Board, and petitioner ceased to bargain with the

Union on the ground that it had a good faith doubt concerning the Union's majority status (Pet. App. 63a-64a).

2. The Board, upholding the ALJ's decision,[1] found that petitioner violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by failing to bargain in good faith with the Union, by making unilateral changes in the employees' terms and conditions of employment, by originating and sponsoring circulation of decertification petitions, and by withdrawing recognition from the Union (Pet. App. 30a-32a).[2]

The ALJ found that "after May 17, 1979, [petitioner] failed to bargain in good faith and instead bargained with a determination not to reach an agreement and to undermine and destroy the Union as bargaining representative" (Pet. App. 66a). In so finding, the ALJ relied on petitioner's unilateral changes in meal and overtime policies (Pet. App. 70a), its "negative and unyielding position" in rejecting the Union's union security and dues checkoff proposals (Pet. App. 78a), and its "organized effort to promote decertification of the Union" (*ibid.*).

The ALJ rejected petitioner's contention that it was entitled to make the unilateral changes because bargaining

---

[1]The Board adopted the ALJ's recommended order, with minor modifications not pertinent here (Pet. App. 31a-32a).

[2]In two subsequent proceedings, which were consolidated with the original proceeding in the court of appeals, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by unilaterally granting an 11% wage increase and an additional holiday to employees on March 29, 1980 (Pet. App. 21a, 23a), and by granting a 10% wage increase and an additional sick day to employees on March 28, 1981, without prior notice to the Union and without giving the Union an opportunity to bargain about these changes (Pet. App. 9a, 11a). These findings rest on the Board's conclusion in the original proceeding that petitioner unlawfully withdrew recognition from the Union (Pet. App. 10a, 22a). Petitioner raises no independent issue concerning them (Pet. 2).

negotiations had reached impasse on May 17, 1979. The ALJ noted that "when negotiations broke off on May 17, there were about 26 open items. Many of them had not even been seriously discussed" (Pet. App. 71a.) He added that when negotiations were resumed many issues were resolved, and that, although petitioner "indicated that its pending proposal was its final offer, such intransigence by one party does not indicate an impasse" (*ibid.*).

The ALJ also concluded that, to the extent an impasse did exist, it was caused by petitioner's failure to bargain in good faith, and thus could not be relied upon as a defense to unilateral changes (Pet. App. 72a). The ALJ explained that petitioner's "intransigence in characterizing its May 17 bargaining position as a 'final offer,' coupled with its direct contacts with employees in an attempt to sell implementation of the overtime proposal is evidence that it was not at this point bargaining in good faith" (*ibid.*).

The Board's orders require petitioner to cease and desist from the unfair labor practices found, and from interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. 157) in any like or related manner. The Board's orders require petitioner, upon request, to bargain in good faith with the Union and, if an understanding is reached, to embody it in a signed agreement, and to post appropriate notices (Pet. App. 31a-34a, 86a-89a).

3. The court of appeals, in an unpublished order, upheld the Board's findings and enforced its orders (Pet. App. 3a-5a). The court found that the record contained "substantial and, perhaps, overwhelming evidence to support the Board's findings" (Pet. App. 4a).

ARGUMENT

In a decision described by the court of appeals as "detailed and careful" (Pet. App. 4a), the ALJ concluded

that petitioner ceased to bargain with the Union in good faith before the collective bargaining process had been exhausted, in violation of Section 8(a)(5) and (1) of the Act, and that it further violated Section 8(a)(5) and (1) by making unilateral changes in the employees' terms and conditions of employment and by originating, instigating, encouraging, assisting, and sponsoring the circulation of decertifcation petitions. The Board upheld the ALJ's decision, with minor modifications not at issue here, and the court of appeals affirmed. The Board's decision is amply supported by substantial evidence. Further review by this Court is unwarranted because the application of the "good faith" standard in the decision below depends solely upon the particular facts of this case and raises no significant unresolved issue of law. *NLRB* v. *American National Ins. Co.*, 343 U.S. 395, 409-410 (1952).

1. Petitioner contends that its course of conduct after May 17, including its unilateral implementation of improvements in compensation for overtime work and elimination of charges for employees' meals, was lawful because an "impasse" in collective bargaining had been reached on May 17 (Pet. 15-19). Substantial evidence supports the ALJ's finding that no genuine impasse had been reached at that stage in the negotiations.

As noted in the ALJ's opinion, as of May 17 neither party had yet made a wage offer, and few, if any, economic proposals had been made and discussed to resolution (Pet. App. 70a). Just six weeks earlier, petitioner and the Union had expressly agreed that a wage increase beyond that put into effect on April 1 would be discussed; in the interim period petitioner's chief negotiator remained away from negotiations for about four weeks (*ibid.*). On May 17, petitioner made an offer — characterized as a "final offer" — to the Union, which the Union agreed to consider. Petitioner nonetheless made unilateral changes in benefits on May 31,

before waiting to hear the Union's response to its May 17 offer (Pet. App. 73a). A further indication that no genuine impasse had been reached by May 17 is that a federal mediator had entered the negotiations only on May 8. As the ALJ pointed out, "It would be incongruous to find an impasse based on such a short period of time after the intervention of a mediator" (Pet. App. 72a).

Indeed, the ALJ identified signs that petitioner had ceased to bargain in good faith even prior to May 17, the date of the alleged impasse. In early May, petitioner circulated notices to the employees concerning implementation of recent wage and benefit changes, stating that the Union had not objected to their implementation. In fact, the Union had objected to the implementation of one key item, an improvement in overtime compensation (Pet. App. 72a). The ALJ also found "intransigence" in petitioner's insistence that its May 17 offer was final (*ibid.*).

Subsequent developments bear out that no genuine impasse was reached as of May 17. Talks resumed on July 10, at which time petitioner informed the Union by letter that it would make economic proposals in the future (Pet. App. 71a). The parties met on eight additional occasions (*ibid.*), and the Union agreed to several significant additional concessions.

Taken as a whole, these facts constitute substantial evidence for the Board's findings. In addition, the ALJ correctly invoked the well-established principle that "there can be no legally cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action, if a cause of the deadlock is the failure of one of the parties to bargain in good faith." *Industrial Union of Marine & Shipbuilding Workers* v. *NLRB*, 320 F.2d 615, 621 (3d Cir. 1963) (footnote omitted), cert. denied, 375 U.S. 984 (1964); accord, *New York Printing Pressmen & Offset Workers* v. *NLRB*,

538 F.2d 496, 501 (2d Cir. 1976). As the ALJ found (Pet. App. 72a-73a), even if an impasse could be said to have occurred, it was caused by petitioner's intransigence and attempts to undermine the Union by direct contacts with the employees.

Petitioner's conduct during October further substantiates the Board's finding that petitioner violated its obligation to bargain in good faith. The ALJ found that on October 9, even as its negotiators were sitting at the bargaining table with the Union, petitioner was briefing its managers on how to conduct employee meetings to decertify the Union. During the October 9 bargaining session, the Union offered to make significant concessions — to withdraw its union security proposal, to abandon its proposal for dues checkoff, to agree to all of petitioner's remaining proposals, and to allow petitioner to set the next annual wage increase at its discretion (Pet. App. 5a-55a, 81a) — yet petitioner declined to close an agreement. Instead, petitioner scheduled a new meeting for October 15. It was not to occur. On October 10, 11, and 12, petitioner conducted group meetings with the employees, distributed decertification petitions, and "actively and aggressively" promoted decertification (Pet. App. 58a-62a, 80a-81a). The ALJ concluded that these steps were "part and parcel of [petitioner's] final effort to destroy the Union" (Pet. App. 81a). He found that as late as October 9, agreement was still possible in light of the Union's concessions, but that petitioner's "duplicitous" scheduling of an additional session at the same time that it was proceeding with a strategy of decertification showed lack of a good faith effort to achieve an agreement (*ibid.*).

2. Petitioner contends (Pet. 8-15) that the Board's conclusion that it failed to bargain in good faith was improperly based on its refusal to agree to the Union's union security

and dues checkoff proposals, in contravention of the principles established in *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970).[3] There is no merit to that contention.

As already discussed, the ALJ relied on the totality of petitioner's conduct, including its unilateral changes in employee benefits, direct dealing with employees, and sponsorship of the decertification effort, as well as on petitioner's intransigence on the union security and checkoff issues. Petitioner's course of conduct before and after May 17 amply supports the ALJ's finding of unfair labor practices; petitioner's intransigence on the issues of union security and dues checkoff were treated by the ALJ solely as "further evidence" of petitioner's failure to bargain in good faith (Pet. App. 76a). Indeed, the ALJ was careful to stress that he viewed petitioner's posture in rejecting the Union's union security and dues checkoff proposals "in the context of other evidence" of petitioner's failure to bargain in good faith (Pet. App. 74a, 76a).

Moreover, contrary to petitioner's arguments (Pet. 6-15), the ALJ did not treat petitioner's mere negotiating position as indicative of a refusal to bargain in good faith. He did not, in petitioner's words, "require[] Petitioner to concede to the [Union's] demands of 'union security and dues checkoff' or be found guilty of having violated Sections 8(a)(1) and (5) of the Act" (Pet. 7-8). Rather, the ALJ found on the basis of petitioner's own statements at the bargaining table that its opposition to a Union security agreement and dues checkoff plan was based on its belief that the Union did not have "majority status or sufficient strength" (Pet. App. 76a), despite the Union's entitlement to a presumption of

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[3]Petitioner also cites *Teamsters Local No. 357* v. *NLRB*, 365 U.S. 667 (1961); *NLRB* v. *American National Ins. Co.*, 343 U.S. 395 (1952); and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Pet. 3).

majority support by virtue of recent Board certification.[4] As the ALJ pointed out, "[a]n employer who approaches negotiations with an eye towards questioning a certified union's representative status is surely not bargaining in good faith" (*ibid.*). An employer is free to reject any particular proposal at the bargaining table, but it is not free to decide for itself whether to treat the Union as the legitimate bargaining agent for its employees. *H.K. Porter, supra,* 397 U.S. at 102, 108 n.6.

If petitioner contends that the Board cannot take into account the content of a party's bargaining proposals when assessing good faith, it is mistaken. This Court has made clear that that determination is made by "drawing inferences from the conduct of the parties as a whole." *NLRB* v. *Insurance Agents' International Union,* 361 U.S. 477, 498 (1960). In *American National Ins. Co., supra,* the Court acknowledged that, while insistence on a management functions clause was not a per se violation of the Act, the Board was not foreclosed from finding, in an appropriate case, that insistence on particular contract terms had been employed as a means of evading the obligation to bargain in good faith (343 U.S. at 409).

Petitioner's reliance (Pet. 10-12) on *H.K. Porter, supra,* is misplaced. There the Court did not question the validity of the Board's finding that the employer had failed to bargain in good faith concerning a dues checkoff proposal; it simply held that the Board's remedial authority does not extend to ordering employers to agree to specific union bargaining

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[4] A union's majority support is presumed to continue following certification and, absent unusual circumstances, the presumption is irrebutable for one year. Thereafter, it may be rebutted by a showing of actual minority status or of a good faith reasonable doubt by the employer of the Union's continued majority support at the time of the refusal to bargain. See *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 279 n.3 (1972); *Brooks* v. *NLRB,* 348 U.S. 96, 98-99 (1954).

demands. Accordingly, the Court invalidated a Board order which specifically required the employer to grant the Union a checkoff provision it had not agreed to in collective bargaining. The Board's order here does not require petitioner to agree to any particular contract provision; it merely requires petitioner to bargain in good faith about terms and conditions of employment (Pet. App. 31a-32a, 86a-89a).

Accordingly, the only issue raised by petitioner's contention is whether substantial evidence supports the Board's finding that petitioner was seeking to avoid reaching any collective bargaining agreement with the Union at all.[5] That evidentiary issue does not warrant further review by this Court. *NLRB* v. *American National Ins. Co., supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

3. Petitioner's final contention, that its participation in the decertification effort was nothing more than the provision of factual information to the employees regarding their rights (Pet. 20-21), also raises only evidentiary issues.

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[5]The court of appeals cases relied on by petitioner (Pet. 13-15) merely reflect application to different factual circumstances of the same legal standards applied by the court of appeals here. In *Chevron Oil Co.* v. *NLRB*, 442 F.2d 1067, 1070-1074 (5th Cir. 1971) (Pet. 13), the court found that the evidence did not support the Board's findings that the company had no intention to deal in good faith with the Union or was dilatory in scheduling meetings and supplying information. Similarly, in *Gulf States Manufacturers, Inc.* v. *NLRB*, 579 F.2d 1298, 1326 (1978), adopted in relevant part en banc, 598 F.2d 896 (5th Cir. 1979) (Pet. 13), *M.R. & R. Trucking Co.* v. *NLRB*, 434 F.2d 689, 695 (5th Cir. 1970) (Pet. 14), and *Pease Co.* v. *NLRB*, 666 F.2d 1044, 1049-1050 (6th Cir. 1981), cert. denied, 456 U.S. 974 (1982) (Pet. 14), the court found that the Board's bad faith finding was based on nothing more than "hard bargaining." In *Pittsburgh-Des Moines Corp.* v. *NLRB*, 663 F.2d 956, 960 (9th Cir. 1981) (Pet. 15), the court found that the employer's attempt to renegotiate a contract offer that initially had been rejected by the Union did not, in the circumstances, support an inference that the employer intended that no agreement be reached.

The ALJ concluded (Pet. App. 78a-83a) that petitioner exceeded the bounds of permissible employer conduct. He based his conclusions on specific occurrences amounting to a campaign "to aggressively and affirmatively sell decertification to its employees" (Pet. App. 80a). The ALJ's findings amply support the Board's conclusions.

The ALJ found, and petitioner does not deny, that petitioner's supervisory officers held meetings with the employees during work time,[6] distributing not just booklets explaining the decertification process, but also forms suggesting the actual language of the petitions[7] (Pet. App. 79a). The ALJ found that "coercion was suggested" in at least one of petitioner's meetings with the employees (Pet. App. 80a). A supervisor questioned why the employees supported the Union, told them that the Union had accomplished nothing, and "insisted that [the petition] had to be signed" (*ibid.*). Petitioner did not, therefore, merely dispense factual information to the employees, but "planted the idea of decertification in the minds of employees, gave them the specific language and forms to effectuate decertification, and, most importantly, led employees, especially the Spanish speaking employees, to believe that [petitioner] was behind and sponsoring the decertification effort" (Pet. App. 80a-81a). Such evidence is the basis for a finding of violation of the Act. See *NLRB* v. *S & H Grossinger's, Inc.*, 372 F.2d 26, 29

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[6]The ALJ found that, prior to petitioner's decertification efforts, only about six or seven employees had expressed dissatisfaction with the Union to petitioner (Pet. App. 80a).

[7]Further doubt is cast upon petitioner's interest in the neutral provision of information by the fact that the decertification booklet was made available only in English, while the draft petition was translated. Some 60% of the employees were predominantly Spanish speaking (Pet. App. 79a).

(2d Cir. 1967); *NLRB* v. *Movie Star, Inc.*, 361 F.2d 346, 348-349 (5th Cir. 1966); *Rogers Mfg. Co.*, 228 N.L.R.B. 882, 886-887 (1977).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

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[8]Petitioner states (Pet. 20) that it refrained from giving the employees any information about decertification until after the certification year had expired on September 27, 1979. As the cited decisions show, however, it is unlawful for an employer actively to promote decertification among the employees, irrespective of whether the one year period of presumptive majority has lapsed.

No. 82-2126

Office-Supreme Court, U.S.
FILED
AUG 8 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARRIOTT IN-FLIGHT SERVICES, A DIVISION OF MARRIOTT CORPORATION,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there is substantial evidence in the record to support the decisions and orders of the National Labor Relations Board warranting enforcement.

2. Whether the Petitioner was negotiating in bad faith in violation of &8(a)5 of the National Labor Relations Act.

3. Whether there was a legal impasse on May 17, 1979 when the Petitioner unilaterally implimented changes in working conditions.

4. Whether the Petitioner was violating &8(a)(1) and (5) National Labor Relations Act in withdrawing recognition of the International Association of Machinists & Aerospace Workers on October 12, 1979 and refusing to negotiate.

5. Whether the Petitioner's involvement in originating, encouraging, sponsoring and assisting the decertification drive violate &8(a)(1) and (5) National Labor Relations Act.

6. Whether the Petitioner is engaging in dilatory tactics to avoid its obligations under the National Labor Relations Act by petitioning for a frivilous appeal.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

STATUTES INVOLVED 1

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT..... 12

I. The National Labor Relations Board.... Properly found the Petitioner violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act..... 12

II. There is Substantial Evidence in the Record to Support the NLRB Orders 21

III. The Petitioner is Engaging in Dilatory Tactics in Petitioning For Certiorari.....23

CONCLUSION 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases: Page

Brooks v. NLRB
348 U.S.96 (1954)..... 21

Cain's Generator & Armature Co.,Inc. v. NLRB
628 F.2d 933 (6th Cir. 1980)..... 20

Carpenter Sprinkler Corp. v. NLRB
605 F.2d 60 (2d Cir. 1979)..... 22

Charles D.Bonanno Linen Service Inc. v. NLRB
434 F.2d 1069 (8th Cir 1970), cert den. 401 U.S.
1009.....23

Cheney California Lumber Co v. NLRB, 319 F2d
375 (9th Cir 1963).....13

Continental Insurance Co. v. NLRB 459 F2d 44
(2nd Cir 1974).....13

Glomac Plastics Inc. v. NLRB 592 F2d 94
(2nd Cir. 1979).....13.22.23

Kellwood v. NLRB, 434 F2d 1069 (8th Cir 1970).....23

NLRB v. All Brands Printing Corp., 594 F2d 926
(2d Cir 1979).....21

NLRB v. Century Cement Mfg.Co., 208 F2d 84
(2d Cir 1953).....15

NLRB v. General Electric Co,, 150 NLRB 192, enf'd
418 F2d 736 (2d Cir 1969), Cert. Den 397
U.S. 965.....13

NLRB v. Herman Sausage Co. 275 F2d 229 (5th Cir 1960).....15

NLRB v. Hommes Tuttle Broadway Ford, 465 F2d 717 (9th Cir. 1972).....15

NLRB v. Insurance Agents Union, 361 U.S. 477 (1960).....12,21

NLRB v. Katz, 369 U.S. 736 (1962).....13

NLRB v. Koenig Iron Works Inc., 681 F2d 130 (2d Cir 1982).....18,20,22,23

NLRB v. Maywood Plant of Crede Plastics, 628 F2dl (2d Cir. 1980).....19,20,22

NLRB v. Milco, Inc., 338 F2d 1933 (2d Cir 1968)..18

NLRB v. Orion Corp., 515 F2d 81 (7 Cir 1975) 19,23

NLRB v. Patent Trader Inc., 415 F2d 190 (2d Cir 1969).....15

NLRB v. Reed and Priest Mfg. Co., 205 F2d 131 (1st Cir 1953)..... 13

NLRB v. Silver Spur Casino, 623 F2d 571 (9th Cir. 1980) cert. denied 451 U.S. 906.....19

NLRB v. Tahoe Nugget, Inc. 584 F2d 293 (9th Cir. 1978) 19

NLRB v. Truitt Mfg. Co., 351 U.S. 149(1956) 12

NLRB v. Windham Community Memorial Hospital 577 F2d 805 (2d Cir. 1978).....16,18,20,22, 23

New York Printing Pressmen & Offset Workers v. NLRB, 538 F2d 496 (2d Cir 1976).....15

N.T. Enloe Memorial Hospital v. NLRB, 682 F2d 790 (9th Cir 1982).....19,23

Queen Mary Restaurants Corp v. NLRB, 560 F2d 403 (9th Cir, 1977).....18,23

Retired Persons Pharmacy v. NLRB, 519 F2d 486 (2d Cir 1975) 19

Taft Broadcasting Co., 136 NLRB 474 (1967).....14

Sahara-Tahoe Corp v. NLRB, 581 F2d 767 (9th Cir 1978) cert., den. 442 U.S. 917.....20

Strauss Communications Inc. v. NLRB, 625 F2d 458, (2d Cir 1980).....20

Universal Camera Corp. v. NLRB 340 U.S. 474 (1950).....12,21,23

Statutes:

29 U.S.C. &158(a)(1) passim
29 U.S.C. &158(a)(5) passim
29 U.S.C. &157 .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MARRIOTT IN-FLIGHT SERVICES,
A Division of Marriott Corporation,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS,
AFL-CIO,

Respondents.

REPLY BRIEF IN OPPOSITION TO CERTIORARI BY RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO.

STATUTES INVOLVED

The statutes involved are 29 U.S.C.&& 157 et seq.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves the review of the record in the administrative determinations of the National Labor Relations Board which ruled the Petitioner engaged in bad faith collective bargaining, unilaterally changed working conditions of employees, sponsored and originated a decertification petition, withdrew recognition of the International Association of Machinists & Aerospace Workers as the representative of the employees. The issue is whether there is substantial evidence to support the determinations. The Petitioner seeks to narrow the issue to the Board finding the Respondent guilty of &8(a)(1) and (5) National Labor Relations Act violations based on the refusal of the Respondent to agree to union security and checkoff demands. The NLRB findings were broader and were based on numerous factual incidents involving the employer's desire not to reach an agreement,unilaterally changing terms and working conditions interferring in the employees' Section 7 rights and withdrawing recognition of the union as the collective bargaining agent without a valid basis.

The question of what constitutes substantial evidence to support the NLRB's decisions has been before the Court on numerous occasions in similar cases. The Court has established the standards the NLRB Board must meet for enforcement. It is readily ascertainable from reviewing the record that the Board did have substantial evidence to justify the decisions and thus the Court should grant enforcement.

STATEMENT OF FACTS

The International Association of Machinists and Aerospace Workers, AFL-CIO, (hereinafter the Union) was certified as the exclusive representative of the employees at the Marriott In-Flight (hereinafter Company) facilities at Kennedy and La Guardia Airports on September 27,1978. Negotiations commenced for a contract on October 20, 1978 with the Union represented be Local Lodge President Coughlin and Chief Negotiator Connolly and the Company by attorney CJ Trosclair and Regional

Vice President Lammers. The parties agreed that non-economic issues would be discussed before economic issues. The Union supplied the format for a contract. The Union at the next meeting supplied a contract outline including provisions for union security and check off along with other items. The Company supplied a contract proposal at the next meeting which did not include union security or checkoff provisions.

At a meeting on December 5, the Company informed the Union of a dental plan it was putting into effect countrywide and wanted to impliment in New York. The Union reserved the right to bargain over the plan. The Company also wanted to impliment insurance and funeral leave plans. All of these items were put into effect on January 1, 1979. The parties continued to meet with the only statement about wages being by Connolly that the Union was not looking for the wage rates of airline employees but rather the rates of the catering companies. On January 30, 1979, Gene White, Vice President of Personal Relations, became part of the Company's negotiating team. The parties continued to discuss the non-economic issues

until March 20 when the issue of the annual April wage increase was raised. The Company, at the next meeting on March 29, mentioned the increase was to be 8% and that the Company wished to impliment the increase forthwith. Connolly initially objected but agreed to reserve the right to bargain on the wage increase in future negotiations. The Company implimented the 8% increase on April 1, 1979.

On April 24, the Company agreed to an overtime proposal which it was putting in effect countrywide as of May 12. The Company notified its New York employees of the agreement and invited questions. At the April 25 meeting Gene White rejected the union shop, union security and checkoff proposals of the Union stating "these items at this time might not be necessary because of the closeness of the election". On April 30, Trosclair said the Company was not going to move any further despite there having been no discussions on wages, union shop or checkoff. Connolly said he would consider the Company's position and

called the Federal Mediation & Conciliation Service to secure a Federal mediator, who did appear at the next meeting on May 8. The Company published and distributed an article to the employees which falsely stated the union agreed to the implimentation of the overtime proposal. At the May 8 meeting Trosclair repeated the Company was not moving on the contract proposals. On May 9, Trosclair sent the Union a telegram offering to impliment the overtime proposal. The Company on May 10 issued a notice to the employees of its offer and the Union not accepting it. At the May 16 negotiating session Vice President White stated the Company wanted to impliment the overtime proposal and Connolly objected.

At the May 17 meeting the Company agreed to the Union proposal for free meals for employees. Trosclair rejected the union security proposal stating the Company did not feel the Union had employee support. Trosclair said the Company was not going any further on contract terms. Connolly said the Union would consider the Company proposals but there were still open items and the Union would contact the Federal

Mediator to set up future negotiating dates. As of May 17 wages, checkoff and union security had not been discussed. On May 24, the Company issued a memo to its employees that the Union hadn't agreed to the overtime implimentation but that the proposals were fair and equitable. On May 31, the Company sent a telegram to the Union stating that an impasse had occurred on May 17 and the Company was implimenting the free meals and overtime proposals as of June 2. On June 1, the Company notified the employees of an impasse and the implimentation of the benefits.

The issue of a strike arose at the negotiating sessions. The Union called a meeting to decide whether to strike but never did authorize a strike nor did the employees actually strike.

The parties resumed negotiating on July 10 and the Company issued a proposed contract which stated on the front page that economic issues would be discussed in the future. On July 26, the Union reduced the union shop demand to a maintainance of membership offer. White, on August 16, stated he was opposed to the maintainance of membership

proposal because the Company did not feel the Union had majority support. On August 27, Trosclair stated the Company wanted the Union to accept the contract proposed by the Company, which did not contain wage increases or union security. Connolly replied there were many open items including the dates for the duration of the contract. Connolly suggested the Union Air Line Co-Ordinator, William Scheri, meet with Marriott officials in Washington D.C. to resolve the open items and Vice President White agreed. The meeting took place in Washington in September and the issues of wages and Union security were discussed along with checkoff but no agreement was reached. Scheri contacted Coughlin and Connolly and told them to go back into negotiations and wrap up the open items. Coughlin called White and set up a meeting for October 2. Upon arriving at the hotel room Connolly objected to negotiating in a bedroom and Trosclair said he understood the meeting was just for the signing of the contract and the Company wasn't there to negotiate. No negotiations took place; however, the parties agreed to meet on October 9 to negotiate. On October 9, the Company presented

a one year contract proposal which the Union agreed to and requested the dates for which the contract would be efective so the employees would know about their future wage increases. Gene White said he would have to consult with his superiors in Washington and refused to negotiate any further despite Connolly's demand that White telephone Washington for an answer. The parties agreed to meet again on October 15 to finalize the contract.

Simultaneously with the negotiating session on October 9, Vice President Jeff Lammers held a meeting with the local company managers in which he informed them that meetings were going to be held for the employees to explain how to decertify the Union and booklets would be distributed explaining decertification of the union. The Company made a decision after October 2 when the Union wouldn't sign the contract to push the decertification meetings and distribution of the booklets. Coughlin asked White at the October 9 meeting about Company involvment in decertifying the Union and White denied any involvment responding that the Company

wanted a contract.

At the Company meetings with the employees held on October 10, 11, 12, on Company time and on Company property a speech was read to the employees. The speech had been authored by Company attorney, Trosclair, and authorized by a Company official at Marriott headquarters in Washington, D.C. The Company posted a notice to the employees to attend the meetings for an updated status of the contract negotiations. An official of Marriott from Washington was introduced at each meeting where the decertification speech was given in English and Spanish by the local manager and the booklet was supplied containing petitions to decertify the Union. Juan Corrado, a local manager, gave a speech in Spanish in which he insisted the employees sign the decertification petition and questioned why the employees were involved with union.

On October 12, Bruce Withrow, a maintainance employee in the certified unit, filed a decertification

petition in Region 29 of the National Labor Relations Board. The petition forms were those supplied by the Company at the meetings with the employees. Withrow had attended an October 10 meeting at which the Company gave out the decertification petitions. Withrow testified he and other employees, who he would not identify, obtained 416 signatures in slightly more than a day; his work shift ran to 4:30 p.m. and the Company meeting at which he learned he could file the petition was held between 1:00 to 2:00 p.m. On October 12 the Company posted a notice to the employees that a decertification petition had been filed with the NLRB. Gene White called Connolly and told him that a decertification petition had been filed and the Company was cancelling the scheduled October 15 meeting because there was a question concerning the Union's majority status. White said to Connolly the Union "blew it". The Company refused to negotiate thereafter

despite requests by the Union.

REASONS FOR DENYING THE WRIT

1. THE NATIONAL LABOR RELATIONS BOARD PROPERLY FOUND THE PETITIONER VIOLATED Sections 8(a)(1) and 8(a)(5) of the NATIONAL LABOR RELATIONS ACT.

An employer has an obligation to bargain in good faith with the collective bargaining representative under Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. &158(a)(5) and (1). "Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims." NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152 (1956). In judging a party's compliance with Section 8(a)(5) a party must have a real desire to come to an agreement, NLRB v. Insurance Agent's Union, 361 U.S. 477, 498 (1960). This determination of good faith bargaining is made by drawing inferences from the conduct of the parties as a whole. Universal Camera Corp, v. NLRB, 340 U.S. 474 (1950);

NLRB v. Reed and Priest MFG CO., 205 F2d 131 (1 Cir. 1953); Continental Insurance Co., v. NLRB, 495 F2d 44 (2d Cir. 1974); Glomac Plastics Inc. v. NLRB, 592 F2d 94 (2d Cir. 1979); Cheney California Lumber Co. v. NLRB, 319 F2d 375 (9th Cir. 1963).

There are numerous factors which can be looked at concerning good faith bargaining. NLRB v. General Electric Co., 150 NLRB 192; enf'd 418 F2d736 (2d Cir. 1969), cert. denied 397 U.S. 965.

The essential element being an intent to adjust differences and reach an acceptable ground by considering and exploring all issues with an open mind. An examination of the facts in the instant case as set forth in the NLRB's decisions reveals the Company lacked the required intent to bargain in good faith

It is a violation of &8(a)(5) to unilaterally impliment changes in working conditions during negotiations unless an impasse exists. NLRB v. KATZ

369 U.S. 736 (1962); Taft Broadcasting Co. 164 NLRB 474 (1967); NLRB v. General Electric Co. 418 F2d 736 (2d Cir. 1969) cert. den. 397 U.S. 965.

The record shows that the Company implimented the overtime and free meal proposals which had been agreed to by the parties when no impasse existed. The Company bases its position for implimenting the changes on the grounds an impasse existed at the May 17, 1979 meeting in which Trosclair, the Company attorney, told the Union that the Company's contract proposal was a final offer. The Company's position is ill founded as Connolly, the Unionspokesman, stated the Union would consider the proposal and get in touch with the Company, a fact admitted to by Gene White, the Company Vice President. The Company issued a bulletin to the employees on May 24 that the overtime and meal issues had not been resolved thereby implying that negotiations were still open and on going. It was on May 31 that the Company asserted for the first time that an impasse had been reached

two weeks earlier and then the Company rationalized the implementation of the benefits on June 1 based on its self proclaimed impasse.

At the time of the Company's final offer on May 17 there had been no negotiations on numerous important issues including wages, union security and checkoff. The Company was giving a "take it or leave it" offer which is a violation of &8(a)(5). If there was an impasse then the impasse was not legal since the Company had been bargaining in bad faith thereby nullifying the impasse as a grounds to impliment benefits NLRB v. Holmes Tuttle Broadway Ford 4652d 717 (9 Cir. 1972); NLRB v. Herman Sausage Co., 275 F2d 229 (5th Cir. 1960), NLRB v. Century Cement Mfg. Co., 208 F2d 84 (2nd Cir 1953); NLRB v. Patent Trader Inc., 415 F2d 190 (2d Cir 1969); New York Printing Pressmen & Offset Workers v. NLRB, 538 F2d 496 (2nd Cir. 1976).

The Company also misrepresented that the

Union had agreed to the implimentation of the overtime in a bulletin to the employees. The Company by issuing its bulletins was dealing directly with the employees rather than with their certified representative to erode the Union position with the employees. The content and tone of the bulletins readily demonstrate the Company's illegal conduct.

The Company took an intransigent position on May 17 when important matters had not yet been discussed. The Company was not bargaining with the intent to reach agreement when it had not discussed all the issues.

During negotiations the Company representatives questioned the status of the Union within the first year of certification and used that issue to deny the checkoff and union security demands of the Union. This conduct is hardly consistent with good faith bargaining. NLRB v. Windham Community Hospital, 577 F2d 805 (2d Cir. 1978) The Company refused to

negotiate on October 2 and refused to finalize the contract on October 9. During the October 2 bargaining meeting the Company was simultaneously holding another meeting on how to decertify the Union, definite evidence of bad faith bargaining. The Company misled employees to induce their attendance at the decertification meetings which were held on Company time and in a captive audience situation. The Company supplied booklets and petitions, which were actually used in the decertification drive. The Company only had inquiries from a few employees at most about the majority status of the Union and definitely not a sufficient number to constitute a valid basis to have a good faith doubt about the Union's majority status. The Company's cancellation of the October 15 bargaining session was based solely on the filing of the decertification petition as stated by Vice President White.

All of these facts show more than a hard bargaining position by the Company which was engaged in surface bargaining with no intent to treat with the Union. The Company was unequivocally not bargaining in good faith. Queen Mary Restaurants Corp. v. NLRB, 560 F2d 403 (9th Cir. 1977); NLRB v. Milco Inc. 338 F2d 133 (2d Cir 1968).

The issue of what grounds an employer can rely on to establish a good faith doubt as to a union's majority status has been clearly established. In the most recently reported case, the Second Circuit in NLRB v. Koenig Iron Works Inc., 681F2d 130 (2d Cir 1982), reaffirmed the criterion enunciated in NLRB v. Windham Community Memorial Hospital, supra 811.

> "Following the expiration of the certification year, the presumption remains in effect but becomes rebuttable..... To rebut the presumption by establishing its good faith doubt, the employer must present clear and convincing evidence of loss of union support capable of raising a reasonable doubt of the Union's continuing majority."

In Koenig the Second Circuit stated at p 317

> "Given the danger that assertions of good faith defense would pose to the stability of the collective bargaining process if not carefully scrutinized, cite omitted, companies relying on the defense must come forward with easily verifiable and unambiguous evidence supporting their belief that their employees have rejected the incumbent union as a bargaining agent. Thus the employer has the burden of producing "clear and convincing evidence of loss of union support," Retired Persons Pharmacy v. NLRB, supra 519 F2d at 489-90, Nazareth Regional High School v. NLRB, 549 F2d 873, 880 (2d Cir 1977)

See also NLRB v. Orion Corp., 515 F2d 81(7Cir 1975); Retired Persons Pharmacy v. NLRB, 519 F2d 486 (2d Cir 1975); NLRB v. Silver Spur Casino, 623 F2d 571 (9th Cir. 1980); cert. den 451 U.S. 906

An employer may not stop bargaining when a decertification petition is filed especially when the Company contributed to the decertification drive. N.T. Enloe Memorial Hospital v. NLRB, 682 F2d 790 (9th Cir 1982); NLRB v. Maywood Plant of Grede Plastics, 628 F2d1 (2nd Cir 1980); NLRB v. Tahoe Nugget, Inc., 584 F2d 293 (9th Cir 1978)

There was no testimony that the Company knew the

number of signatures filed at the Board so there could not have been a good faith doubt as to the union majority status. Cain's Generator & Armature Co., Inc v. NLRB, 628 F2d 933 (6th Cir 1980). The inquiries from employees concerning the status of the union numbered no more than 6 or 7 out of a unit in excess of 750. The so called strike threats, if they in fact were made, and change in bargaining status do not constitute the basis for a good faith doubt. All of the reasons advanced by the Company fall far short of clean, convincing and cogent evidence. Sahara-Tahoe Corp. v NLRB, 581 F2d 767 (9th Cir 1978), cert denied 442 U.S. 917; NLRB v. Maywood Plant of Grede Plastics, supra; NLRB v. Koenig Iron Works Inc., supra; NLRB v. Windham Memorial Hospital, supra; Strauss Communications Inc. v. NLRB, 625 F2d 458 (2nd Cir 1980).

If the Employer had a good faith doubt as to the majority status of the Union, it must bargain or take action by filing a petition on its own.

NLRB v. All Brands Printing Corp., 594 F2d 926 (2nd Cir 1979); Brooks v. NLRB, 348 U.S. 96 (1954) Under the facts in the instant case the Company was actively involved in the decertification drive, which the Company describes as a "lightning move". The creditability of the Company is stretched beyond all limits as to its good faith doubt of the Union's majority status. The finding of the Board as to the participation of the Company in the decertification drive is well documented as is the violation of the Section 7 rights of the employees to be free from interference in the choosing of their representative.

II THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE NLRB ORDERS

The Supreme Court has repeatedly enunciated the standard of review which the Courts are bound by in reviewing the NLRB's orders. In NLRB v. Insurance Agents, supra; Universal Camera v. NLRB, 454 U.S. 404 (1982), the Supreme Court has held

that the review is limited to whether there is substantial evidence to support the Board determination and where there is such evidence the Courts must defer to the Board's recognized expertise. Windham Hospital, supra, Koenig Iron Works, Inc., supra, and Glomac Plastics, Inc., supra, Maywood Plant, supra.

In reviewing the record on which the Board made its decision, there is more than ample support for the Board's orders. The Board had specific testimony and documentary evidence on which to base its findings. There were several grounds for finding the bad faith bargaining throughout the bargaining sessions, ranging from the improper questioning of the Union's majority status during the certification year, to the Company refusing to sign the contract at the October 9 bargaining session. The evidence on impasse and direct dealing with the employees to undermine the Union is spread across the record. Carpenter Sprinkler Corp. v. NLRB., 605 F2d 60 (2d Cir. 1979) The involvement of the Company

in sponsoring and supporting in the decertification petition is well documented.

The determination of the Board once there is substantial evidence falls within the Board's expertise and even if the Court disagrees with the Board's conclusion it must sustain the Board. Clomac Plastics, supra ; Bonnono Linen Service Inc., supra; Koenig Iron Works Inc., supra; Universal Camera Corp., Windham Hospital, supra; Queen Mary Restaurant Corp., supra; Enloe Memorial Hospital, supra; Kellwood v. NLRB, 434 F2d 1069 (8th Cir 1970), cert. denied 401 U.S. 1009; Orion Corp., supra. As there is substantial evidence to support the Board's orders, the Court should enforce them.

III. THE PETITIONER IS ENGAGING IN DILATORY TACTICS IN PETITIONING FOR CERTIORARI.

A review of the chronology in the history of the relationship between the Petitioner and the International Association of Machinists & Aerospace Workers reveals substantial time delays. After a hard fought and

bitter election the Union was finally certified on September 27, 1978, some five years ago. The Petitioner has bargained in bad faith and violated its obligations under the National Labor Relations Act. It has taken continuous action to avoid its obligations to bargain in good faith with the Union.

The Second Circuit Court of Appeals commented in its decision that it "would decry Marriott's appeal in this case as another instance whereit has imposed dilatory impediments in the way of negotiations." The Second Circuit cast equal blame for the appeal delay on the NLRB; however, after the Second Circuit's decision Marriott engaged in further delaying tactics. Marriott petitioned for a rehearing in banc which was denied on May 2,, 1983. Marriott then waited until the time period was almost exhausted to file the petition for writ of certiorari. It is clear that Marriott is following the same path that J.P. Stevens used previously but has since abandoned.

There is no basis for an appeal and Marriott is

seeking to subvert the National Labor Relation Act. The Court should impose sanctions against Marriott for its actions.

CONCLUSION

The NLRB's orders in this case have been based on substantial evidence and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, KEVIN P. QUILL, hereby certify that I have on August 5, 1983, by United States Mail, postage prepaid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

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